Harry Eldridge H-06424
Mule Creek State Prison
P.O. Box 409060, C-13-244-L
Ione, CA 95640

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HARRY ELDRIDGE,
Petitioner,

v.

RICHARD SUBIA, (Warden)
Respondent.
_____/

Docket No. _____

NOTICE OF LODGMENT OF EXHIBITS

JSW

(PR)

NOTICE TO ALL PARTIES:

Petitioner, Harry Eldridge, hereby serves notice that he has lodged a separate volume of supporting exhibits in the above entitled court and cause of action.

Dated: 5-22-08

Respectfully submitted:

Harry Eldridge, In Pro Se

Harry Eldridge H-06424
Mule Creek State Prison
P.O. Box 409060, C-13-244-L
Ione, CA 95640

In Pro Se

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Eldridge

Docket No. _____

VOLUME OF EXHIBITS OFFERED IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

From Judgment (Sentencing) rendered in the Superior Court of the State of California for the County of Santa Clara before Honorable Judge Robert M. Foley

_____
Harry Eldridge, In Pro Se

EXHIBIT "A"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FILED

MAR 12 2007

KIRI TORRE
Chief Executive Officer
Superior Court of the County of Santa Clara
BY DEPUTY

In re	No. 142464
Harry Eldridge	Order
On Habeas Corpus	

Harry Eldridge (Petitioner) has filed multiple habeas corpus petitions. In the present petition, petitioner contends he is entitled to relief under the recent case of *Cunningham v. California* (2007) 166 L.Ed.2d. 856.

Petitioner's case was final prior to *Cunningham, supra*, and *Blakely v. Washington* (2004) 542 U.S. 296. Petitioner is therefore not entitled to relief.

Accordingly, the Petition is DENIED.

Date: 12 Mar 2007

PAUL BERNAL
JUDGE OF THE SUPERIOR COURT

Cc: Petitioner
District Attorney
Research
CJ I C

EXHIBIT "B"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re HARRY ELDRIDGE, on Habeas Corpus.	H031358 (Santa Clara County Super. Ct. No. 142464)

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Premo, Acting P.J., Elia, J., and Duffy, J., participated in this decision.)

Dated MAY 2 - 2007

PREMO, J. Acting P.J.

EXHIBIT "C"

S152690

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re HARRY ELDRIDGE on Habeas Corpus

The petition for writ of habeas corpus is denied.

GEORGE

Chief Justice

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HARRY ELDRIDGE, Petitioner, vs. RICHARD SUBIA, Warden, Respondent.	No. C 07-5650 JSW (PR) **ORDER DISMISSING PETITION FOR A WRIT OF HABEAS CORPUS** (Docket No. 3)

This is a petition for a writ of habeas corpus brought *pro se* by Petitioner pursuant to 28 U.S.C. § 2254 challenging the constitutional validity of his state conviction. Petitioner has filed a motion to proceed *in forma pauperis* which is now GRANTED (docket no. 3). Petitioner's earlier habeas petition was filed under Case No. C:04-cv-0088 JSW (PR). That petition was denied as untimely by this Court on October 3, 2005. Petitioner now files a separate habeas petition raising what appear to be different claims on the than those raised in his earlier petition.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law on April 24, 1996. Under AEDPA, a district court must dismiss claims presented in a second or successive habeas petition challenging the same conviction and sentence that were raised in a previous petition. *See* 28 U.S.C. § 2244(b)(1); *Babbitt v. Woodford*, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a district court must dismiss any new claims raised in a successive petition unless the petitioner received an order from the court of appeals authorizing the district court to consider the petition. 28

U.S.C. § 2244(b)(3)(A).

Here, the instant petition challenges the same conviction and sentence as the previous petition decided by this Court in 2005. Petitioner has not presented an order from the court of appeals authorizing the Court to consider these claims. Accordingly, the Court must dismiss the instant petition in its entirety. Petitioner is free to seek such an order from the United States Court of Appeals for the Ninth Circuit. *See*, 28 U.S.C. § 2244(b)(3)(A).

CONCLUSION

For the forgoing reasons, the petition for writ of habeas corpus is DISMISSED as a second and successive petition. The Clerk shall close the file and enter judgment in this matter.

IT IS SO ORDERED.

DATED: November 29, 2007

JEFFREY S. WHITE
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

HARRY EDLRIDGE,

Plaintiff,

v.

RICHARD SUBIA et al,

Defendant.

_____/

Case Number: CV07-05650 JSW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 29, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Harry L. Eldridge
P.O. Box 409000
H06424
Ione, CA 95640-9000

Dated: November 29, 2007

Jennifer Ottolini

Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk

EXHIBIT "E"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In re	
	No. 142464
HARRY ELDRIDGE,	**O R D E R**
Ex Parte	

Mr. ELDRIDGE has submitted to this Court a "Motion Requesting Correction of Sentence" in which he seeks to vacate, modify, 'correct,' reduce, waive, reconsider, or dispose of, his restitution fine/order. All requested relief or action is DENIED.

Petitioner's claim of error should have been presented to the Sixth District in either a direct appeal or in Petitioner's most recent habeas corpus petition H031358. The matter may not now be considered by the Superior Court.

DATED: 1/28, 2008

DIANE NORTHWAY
JUDGE OF THE SUPERIOR COURT

cc: Petitioner
District Attorney
Research(12-31A)
CJIC

EXHIBIT "F"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HARRY ELDRIDGE,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

H032586
(Santa Clara County
Super. Ct. No. 142464)

BY THE COURT:

The petition for writ of mandate is denied.

(Premo, Acting P.J., Elia, J., and Duffy, J., participated in this decision.)

Dated FEB 15 2008

PREMO, J. Acting P.J.

EXHIBIT "G"

Court of Appeal, Sixth Appellate District - No. H032586
S161227

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HARRY ELDRIDGE, Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;

THE PEOPLE, Real Party in Interest.

The petition for review is denied.

Chief Justice

EXHIBIT "H"

ABSTRACT OF JUDGMENT – PRISON COMMITMENT

FORM DSL 29

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
BRANCH DOWNTOWN
COURT I.D. 4 3 1 0 0

CASE NUMBER (S): 142464 - A

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: HARRY LEE ELDRIDGE
AKA:

[X] PRESENT [ ] NOT PRESENT

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

AMENDED ABSTRACT [ ]

- B
- C
- D
- E

DATE OF HEARING (MO) (DAY) (YR)	DEPT. NO	JUDGE	CLERK
JULY 26, 1991	11	HONORABLE JOHN SCHATZ	A. COMANDA

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR PROBATION OFFICER
P. HYNES	L. DARLING	R. CHERRINGTON	G. BEAL

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS)

[XX] ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT 1 (NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	TYPE (F, M, O)	SENTENCE RELATION CONCURRENT	CONSECUTIVE (25 YRS MAX)	CONSECUTIVE (10 YRS MAX)	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE(S) (CS) AFTER (A)	667.5(b)	PRINCIPAL OR CONSECUTIVE TIME IMPOSED YEARS	MONTHS
04	PC	245(a)(1)	ASS W/ D/D WEAPON	90	05	03	91	XX			U							04	00
09	PC	136.1(c)	DISSUADE WITNESS	90	05	03	91	XX			M			X				03	00
16	PC	136.1(c)	DISSUADE WITNESS	90	05	03	91	XX			M			X				03	00
11	PC	245(a)(1)	ASS W/ D/D WEAPON	90	05	03	91	XX			M	X						03	00
12	PC	245(a)(1)	ASS W/ D/D WEAPON	90	05	03	91	XX			M	X						03	00

2. **ENHANCEMENTS** charged and found true **TIED TO SPECIFIC COUNTS** (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:
For each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385.
Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

3. **ENHANCEMENTS** charged and found true **FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS** (mainly § 667-series) and OTHER.
List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here a other enhancement not provided for in space 2.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

4. INCOMPLETED SENTENCE(S) CONSECUTIVE:

COUNTY	CASE NUMBER	CREDIT FOR TIME SERVED

5. OTHER ORDERS: PROBATION DENIED, $100 RF, $100 FINE PER PC290.3, AIDS TESTING STIP/ORDERED, REGISTER PER PC 290, ADVISED OF PAROLE PERIOD, ADVISED OF APPEAL RIGHTS
Use additional sheets of plain paper if necessary.

6. TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DSL 290-A): 80 00
7. TIME STAYED TO COMPLY WITH 5-YEAR OR 10-YEAR LIMIT ON SUBORDINATE TERMS, DOUBLE-BASED-TERM LIMIT, ETC. (Do not include § 654 stays or discretionary stays of term for enhancements.)
8. TOTAL TERM IMPOSED: 90 00

9. EXECUTION OF SENTENCE IMPOSED:
A. [X] AT INITIAL SENTENCING HEARING B. [ ] AT RESENTENCING PURSUANT TO DECISION ON APPEAL C. [ ] AFTER REVOCATION OF PROBATION D. [ ] AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170(d)) E. [ ] OTHER

10. DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR)	CREDIT FOR TIME SPENT IN CUSTODY	TOTAL DAYS	INCLUDING: ACTUAL LOCAL TIME	LOCAL CONDUCT CREDITS	STATE INSTITUTIONS
07/26/91		505	337	168	[ ] DMH [XX] CDC

11. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:
[ ] FORTHWITH [ ] AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:
[ ] CALIF. INSTITUTION FOR WOMEN – FRONTERA [XX] CALIF. MEDICAL FACILITY – VACAVILLE [ ] CALIF. INSTITUTION FOR MEN – CHINO [ ] DEUEL VOC. INST.
[ ] SAN QUENTIN
[XX] OTHER (SPECIFY): STAYED TO AUGUST 23, 1991

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE: Adrienne Comanda ADRIENNE COMANDA
DATE: JULY 31, 1991

This form is prescribed under Penal Code § 1213.5 to satisfy the requirements of § 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

Form Adopted by the Judicial Council of California
Effective April 1, 1990

ABSTRACT OF JUDGMENT – PRISON COMMITMENT
FORM DSL 290

SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA

000389

DISTRIBUTION: PINK COPY – COURT FILE YELLOW COPY – DEPARTMENT OF CORRECTIONS WHITE COPY – ADMINISTRATIVE

ABSTRACT OF JUDGMENT – PRISON COMMITMENT ATTACHMENT PAGE

FORM DSL 290-A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
BRANCH DOWNTOWN
COURT I.D. 4 3 1 1 00

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: HARRY LEE ELDRIDGE
AKA:

XX PRESENT ☐ NOT PRESENT

CASE NUMBER (S): 142464 - A; - B; - C; - D; - E

COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT — AMENDED ABSTRACT ☐

DATE OF HEARING (MO) (DAY) (YR): 07 26 91

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS):

THIS IS ATTACHMENT PAGE NO. _____

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	SENTENCE RELATION TERM (L/M/U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIO	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCES DESIGNATED	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED YEARS	MONTHS
10	PC	236-237	FALSE IMPRISONMENT	90	05	03	90	XX			M	X						(02	00)
19	PC	236-237	FALSE IMPRISONMENT	90	05	03	90	XX			M	X						02	00
05	PC	261(2)	RAPE	90	05	03	90	XX			U		X					08	00
06	PC	261(2)	RAPE	90	05	03	90	XX			U		X					08	00
07	PC	288a(c)	ORAL COPULATION	90	05	03	90	XX			U		X					08	00
08	PC	288a(c)	ORAL COPULATION	90	05	03	90	XX			U		X					08	00
13	PC	261(2)	RAPE	90	05	03	90	XX			U		X					08	00
14	PC	261(2)	RAPE	90	05	03	90	XX			U		X					08	00
15	PC	261(2)	RAPE	90	05	03	90	XX			U		X					08	00
20	PC	288a(c)	ORAL COPULATION	90	05	03	90	XX			U		X					08	00
21	PC	288a(c)	ORAL COPULATION	90	05	03	90	XX			U		X					08	00
22	PC	288a(c)	ORAL COPULATION	90	05	03	90	XX			U		X					08	00

2. ENHANCEMENTS charged and found true, TIED TO SPECIFIC COUNTS (mainly in the 12022 series) for counts listed on this page.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total	

3. ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total	
Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total	

4. TOTAL TIME IMPOSED ON THIS ATTACHMENT PAGE: 80 00

SUPERIOR COURT OF CALIFORNIA SANTA CLARA COUNTY

ABSTRACT OF JUDGMENT – PRISON COMMITMENT
ATTACHMENT FORM DSL 290-A

000390

Form Adopted by the Judicial Council of California Effective April 1, 1990

Pen.C. 1213.5

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EXHIBIT "I"

COURT I.D. 13100 BRANCH

CASE NUMBER (S) 142464 A

OPLE OF THE STATE OF CALIFORNIA versus
FENDANT: HARRY LEE ELDRIDGE
AKA:

[X] PRESENT [ ] NOT PRESENT

MMITMENT TO STATE PRISON
STRACT OF JUDGMENT

AMENDED ABSTRACT [ ]

- B
- C
- D
- E

E OF HEARING (MO) (DAY) (YR)	DEPT. NO	JUDGE	CLERK
3-4-94	31	ROBERT M. FOLEY	D. OYAMA

ORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR PROBATION OFFICER
CHRIS CORRIGAN	LORI DARLING	ROBERT CHERRINGTON	DIANE CUNNINGHAM

DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS):

[X] ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT 1 (NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	SENTENCE RELATION TERM (L,M,U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIO.	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE(S) CS-REFER #4	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED YEARS	MONTHS
4	PC	245(a)(1)	ASLT W/DDLY WPN-FLASHLTE	90	05	03	91	X			U							4	0
9	PC	136.1(a)	DISSUADE WITNESS BY FRCE	90	05	03	91	X			M				X			3	0
10	PC	236/237	FALSE IMPRISONMENT	90	05	03	91	X			M	X						(2	0)
11	PC	245(a)(1)	ASLT W/DDLY WPN-SWORD	90	05	03	91	X			M			X				1	0
12	PC	245(a)(1)	ASLT W/DDLY WPN-FISTS	90	05	03	91	X			M			X				1	0

ENHANCEMENTS charged and found true **TIED TO SPECIFIC COUNTS** (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:
For each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385.
Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

ENHANCEMENTS charged and found true **FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS** (mainly § 667-series) and **OTHER**.
List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) 2 times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

INCOMPLETED SENTENCE(S) CONSECUTIVE:

COUNTY	CASE NUMBER	CREDIT FOR TIME SERVED

5. OTHER ORDERS: $1000=REST/FINE ADVISED OF APPEAL RIGHT. CALIFORNIA DEPT OF CORRECTIONS TO CALCULATE CREDIT TIME SERVED FROM 7-27-91 TO PRESENT. DEFENDANT TO BE RETURNED TO FOLSOM FORTHWITH.

Use additional sheets of plain paper if necessary.

TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DSL 290-A):	75	0
TIME STAYED TO COMPLY WITH 5-YEAR OR 10-YEAR LIMIT ON SUBORDINATE TERMS, DOUBLE-BASED-TERM LIMIT, ETC. (Do not include § 654 stays or discretionary stays of term for enhancements.)		
TOTAL TERM IMPOSED:	84	0

EXECUTION OF SENTENCE IMPOSED:

A. [ ] AT INITIAL SENTENCING HEARING B. [ ] AT RESENTENCING PURSUANT TO DECISION ON APPEAL C. [ ] AFTER REVOCATION OF PROBATION D. [X] AT RESENTENCING PURSUANT TO [redacted] E. [ ] OTHER CDC notification

DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR): 3-4-94

CREDIT FOR TIME SPENT IN CUSTODY: TOTAL DAYS 505 THRU 7-26-91* INCLUDING:

ACTUAL LOCAL TIME 337 LOCAL CONDUCT CREDITS 168

STATE INSTITUTIONS [ ] DMH [ ] CDC

DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

[X] FORTHWITH
[ ] AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
[ ] INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:
[ ] CALIF. INSTITUTION FOR WOMEN – FRONTERA
[ ] CALIF. MEDICAL FACILITY – VACAVILLE
[ ] CALIF. INSTITUTION FOR MEN – CHINO
[ ] DEUEL VOC. INST.
[ ] SAN QUENTIN
[X] OTHER (SPECIFY): DEFENDANT TO BE RETURNED TO FOLSOM FORTHWITH.

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE Saturnina B. Chua DATE MAR 8 1994

ABSTRACT OF JUDGMENT – PRISON COMMITMENT ATTACHMENT PAGE

FORM DSL 290-A

☒ SUPERIOR ☐ MUNICIPAL ☐ JUSTICE

COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

COURT (I.D.) 43100

BRANCH OR JUDICIAL DISTRICT: HOJ

CASE NUMBER (S): 142464 - A

PEOPLE OF THE STATE OF CALIFORNIA versus

DEFENDANT: HARRY LEE ELDRIDGE AKA:

☒ PRESENT ☐ NOT PRESENT

COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT

AMENDED ABSTRACT ☐

DATE OF HEARING (MO) (DAY) (YR): 3 4 94

1 DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS)

THIS IS ATTACHMENT PAGE NO. 1

SENTENCE RELATION

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	TERM (L/M/U)	CONSECUTIVE	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIO	CONSECUTIVE FULL TERMS	INCOMPLETE SENTENCE(S) (CS/MISD)	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED YEARS	MONTHS
16	PC	136.1(c)	DISSUADE WITNESS BY FRCE	90	05	03	91	X			M				X			3	0
19	PC	2367237	FALSE IMPRISONMENT	90	05	03	91	X			M	X						(2	0)
13	PC	261(2)	RAPE	90	05	03	91	X			U				X			8	0
14	PC	261(2)	RAPE	90	05	03	91	X			U				X			8	0
15	PC	261(2)	RAPE	90	05	03	91	X			U				X			8	0
20	PC	288a(c)	ORAL COPULATION BY FORCE	90	05	03	91	X			U				X			8	0
21	PC	288a(c)	ORAL COPULATION BY FORCE	90	05	03	91	X			U				X			8	0
22	PC	288a(c)	ORAL COPULATION BY FORCE	90	05	03	91	X			U				X			8	0
5	PC	261(2)	RAPE	90	05	03	91	X			M				X			6	0
6	PC	261(2)	RAPE	90	05	03	91	X			M				X			6	0
7	PC	288a(c)	ORAL COPULATION BY FORCE	90	05	03	91	X			M				X			6	0
8	PC	288a(c)	ORAL COPULATION BY FORCE	90	05	03	91	X			M				X			6	0
																	TOTAL	75	0

2 ENHANCEMENTS charged and found true, TIED TO SPECIFIC COUNTS (mainly in the 12022 series) for counts listed on this page

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
Comments by Dist Atty & Deft Cnsl											
Peo. Exhibit #1--8 photos											
Deft Exh "A"--2 documents											
Exhibits admitted and returned to parties.											
										TOTAL	

3 ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

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ABSTRACT OF JUDGMENT – PRISON COMMITMENT
ATTACHMENT FORM DSL 290-A

Pen.C 1213.5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HARRY LEE ELDRIDGE,

Defendant and Appellant.

No. H008751
(Santa Clara County
Sup.Ct. No. 142464)

FILED

MAY 6 - 1993

Court of Appeal - Sixth Dist.
BY _____ Deputy

A jury found Harry Lee Eldridge guilty of seventeen sex-related felonies committed upon two victims, and he was sentenced to prison for 90 years. He appeals, asserting errors in removal and replacement of a juror during deliberations, in several of the trial court's evidentiary rulings, and in sentencing. The People concede that the matter must be remanded for resentencing. We find no other reversible error.

Eldridge was accused by amended information of a total twenty-two crimes against three women in separate episodes.

The March 1989 Episode with Yvonne

The first episode occurred in March 1989 and involved a woman named Yvonne. To prove charges that Eldridge had falsely imprisoned her and had forced her to copulate him orally the People relied solely on Yvonne's testimony. Yvonne recounted that in March 1989 her sister Andrea lived with Eldridge, that at her sister's instance she visited the house where Eldridge lived, that she later returned to the house, and that Eldridge kept her

at the house agai t her will on both occasi s, tried to persuade her to copulate him orally on the first occasion, and forced her to do so on the second occasion. In his own behalf Eldridge testified that Yvonne had come to the house voluntarily on both occasions, that she had dressed and acted in a sexually provocative manner, and that he had neither imprisoned her nor engaged in sexual activity with her. Eldridge also called as a witness a woman named Janet, who also lived at the house and was described as Eldridge's former girlfriend, and whose testimony concerning Yvonne was generally consistent with Eldridge's. Another defense witness testified that it appeared to her Yvonne was flirting with Eldridge. The jury acquitted Eldridge of both counts arising out of the episode with Yvonne.

The March 1990 Episode with Kathryn

The second episode occurred one year later, in March 1990. A woman named Kathryn testified that she had been acquainted with Eldridge and that one evening he asked her to help his wife drive back from jail after Eldridge turned himself in. But when Eldridge came for her, Kathryn testified, he was alone and he took her to his house where he beat her with a flashlight and a hammer, gagged her with a towel and washcloth, bound her with wire and tape, raped her more than twice and forced her to copulate him orally more than twice. She finally escaped from the house when Eldridge was asleep.

Kathryn was a hesitant and inarticulate witness. She acknowledged that she had taken drugs during the episode, and that initially she did not wish to report the episode to the

police. To corr: rate Kathryn's account t: People called several additional witnesses. Kathryn's boyfriend described her bloody and bruised condition when she returned and recited that Kathryn said she had been sexually assaulted by Eldridge. The boyfriend called the police. The police officer who responded to the call also described Kathryn's condition (including head injuries, scrapes, abrasions, and marks on her wrists), and testified that he took Kathryn to a hospital but that she did not immediately provide details of sexual assaults. Two sexual assault response team nurses from the hospital described Kathryn's injuries and were permitted to recite details of Kathryn's statements to them. A police sexual assault unit investigator named Phillips, who did not meet or interview Kathryn until the end of August 1990 (five months after the episode), was permitted to testify that at that time Kathryn had told him that Eldridge had raped her repeatedly, forced her to copulate him orally, hit her with a flashlight, a framing hammer, and a machete, and tied her with wire, duct tape and cloth.

Eldridge's defense was that Kathryn had initiated the episode by seeking drugs in exchange for sexual favors, that he had had consensual sex with Kathryn on ten previous occasions, that their only sexual contact in March had been consensual, and that any injuries Kathryn may have sustained were attributable to her own uncontrolled physical behavior after she used drugs at the house: According to Eldridge and Janet, Kathryn fell down at least twice and once tried to run through a window.

The People based eight counts of the amended information on the episode with Kathryn. The jury found Eldridge guilty of two

counts of forcibl rape, two counts of oral pulation, aggravated assault with a flashlight, forcibly dissuading Kathryn from prosecuting him, and false imprisonment, and acquitted him of aggravated assault with a sword.

The August 1990 Episode with Elizabeth

The third episode, in August 1990, involved a girl named Elizabeth who was 14 years old, and pregnant, at the time. Elizabeth testified that Eldridge, whom she knew slightly, had invited her to watch movies. He picked her up and took her to a liquor store from which he brought her an opened soda. She drank the soda and "started feeling real weird." Elizabeth testified that Eldridge then took her to his house where he administered drugs to her, made her take off her clothes, struck her, tied and taped her and shackled her with handcuffs, masturbated in front of her, applied a vibrator and various artificial sexual devices to her, raped her more than three times, forced her to copulate him orally more than three times, and pierced her breast with a needle and inserted an earring into the hole. Elizabeth testified that a woman, by description Janet, participated in some of the sexual attacks on her. Elizabeth finally escaped; she had been gone four days. A relative called the police. Police officers and a sexual assault response team nurse corroborated details of Elizabeth's account. It was Elizabeth's account of the August 1990 episode that prompted Phillips to reinterview Kathryn.

Eldridge's defense was that he had gone looking for a prostitute and Elizabeth had been made available to him, by her

'grandmother, as . prostitute; that she dres . in a sophisticated way and appeared to be between 17 and 19 years old; that they agreed that if she stayed with him for a period of days he would obtain for her a pickup truck she very much wanted; that all of their sexual contact was consensual; that he never hit her; and that when he learned she was only 14 years old he counseled with her, offered her a place to live, and had no further sexual contact with her. Eldridge called several witnesses who said they had seen Eldridge and Elizabeth, together away from the house, during the four days and that Elizabeth had shown no distress and had taken no advantage of several opportunities simply to walk away. Janet acknowledged that Elizabeth had been at the house and generally corroborated Eldridge's version of Elizabeth's stay; she denied she had participated in any attacks on Elizabeth.

Of the twelve counts of the amended information arising out of the episode with Elizabeth the jury found Eldridge guilty of three counts of forcible rape, three counts of forcible oral copulation, two counts of aggravated assault (with a sword and with fists), forcibly dissuading Elizabeth from prosecuting him, and false imprisonment, and acquitted him of kidnaping and mayhem.

1. Removal and Replacement of Juror

On the third day of jury deliberation the trial court removed a juror and replaced him with an alternate juror; shortly thereafter the jury returned its verdicts. Eldridge asserts

(a) That the record does not support the trial court's conclusion that the removed juror had been unable to perform his

duty, and therefore the removal violated Eldridge's Sixth Amendment right to trial by an impartial jury; and

(b) That the court did not sufficiently instruct the jury, after the juror was replaced, that its deliberations must be commenced anew.[1]

a. Inability to Perform Duties

Where (as in this case) alternate jurors have been selected, "[i]f at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his duty, . . . the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box . . . ." (Pen. Code, § 1089; cf. also Code Civ. Proc., § 233.)

Eldridge argues that the record does not furnish good cause for a finding that the removed juror was unable to perform his duty.

The problem was foreshadowed at the end of the first day of deliberation (a Wednesday), after the jury asked for, and was denied, access to police reports and preliminary examination transcripts that were not in evidence. Juror Five (later identified as the jury foreperson) remarked: "Probably will

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[1] Eldridge has withdrawn his contention that the jury foreman's indication that at the time of the removal the jury had reached unspecified unanimous verdicts as to three counts raises former-jeopardy issues which vitiate all the verdicts.

we'll [sic] be he Friday or next Monday th Friday at best." In response to the trial court's question Juror Five said no votes had been taken. Juror Twelve said: "We did on -- " Juror Three interrupted: "We're not able to. We haven't been unanimous on any of our discussions." Juror Five said: "We're getting nowhere. [¶] The Court: Well, it's only the first day. [¶] Juror Five: Many, many more days like this, I think." Deliberations were then recessed overnight.

After lunch Thursday, the second day of deliberation, the bailiff informed the court that Juror Twelve had approached him "and asked what would happen if he wasn't to come back. And he referred to he had several different problems. Something about losing a job, he wasn't eating, couldn't sleep . . . ."

Out of the presence of the other jurors, Juror Twelve told the court and counsel: "I find myself under personal attack by three of the specific jurors. They surrounded me with all pictures yesterday in hope I would see them better. They've made dozens of statements in regards to me being responsible, being the cause of this problem -- of their problem, of their inability to go back to work or their being involved in a hung jury." Juror Twelve said he had no personal problem aside the jury deliberations, "[b]ut it's a growing concern in the desire to come back here again. I have no interest today at this time to return again. And I am finding that concern growing. I can't eat. I quit my job."

The court remarked: "I notice you're getting kind of choked up. [¶] Juror Twelve: I can't function. [¶] The Court: You don't feel that you could deliberate any further with the other

jurors? [¶] Juror Twelve: To this point, I have already expressed my opinions on all twenty-two counts and the reasons why, speculation, through experience, through my beliefs. And at this time, I will not change." Juror Twelve complained that "[a]ll of the deliberations are being directed at me specifically," that "I am growing angrier by the hour, and angrier by the hour," that "[m]y integrity is being questioned, my intelligence is being questioned, my morals is being questioned." He stated that "that's not why I came here. I don't believe it's a part, or should be a part of this proceeding. [¶] I know what I feel. I have examined my feelings, and I still feel confirmed in what I believe, period."

Juror Twelve also volunteered that "[t]hey wanted to throw me out the first hour I was in there. They said, you know, maybe we ought to get you out of here, go grab one of the alternates before they go home. [¶] I offered, I said, 'Fine, do it, if that's possible.'" He again indicated there were "three particular jurors" who, he felt, "have made attacks on my integrity, my intelligence, morals."

Juror Twelve was then excused with the assurance that the court and counsel would "discuss the matter, . . . [and] see what we can do." After discussion in which both counsel expressed a desire to research the law, the court called the jury back to hear a readback of testimony previously requested. After the readback the court asked the foreperson whether any votes had been taken; she replied that several votes had been taken but only one unanimous verdict reached: "[O]therwise, we're essentially hung." The foreperson expressed a desire to have "an

advisory talk with the court and counsel. Ultimately the court sent the jury back out to deliberate and excused counsel to begin their research. Thereafter the jury's deliberations were recessed for the night.

On Friday morning the prosecutor asked the court to question the foreperson "so we can ascertain whether or not Juror . . . Twelve should be removed for good cause." Defense counsel agreed the foreperson should be heard but indicated the defense would object to removing the juror. The foreperson was brought in.

The court structured the colloquy by saying that "from what I was told, . . . one of the jurors was not participating in the case so far as refusing to participate?" The foreperson responded: "Right. He walked in the jury room, said, 'My mind is this. I'm not going to change it. I'm not going to listen to anybody. That's the end of the story.' [¶] Now we're trying to say, you know, 'We have got to work on this as a team. We have all got to keep an open mind.' 'I refuse to keep an open mind.' [¶] But -- this is something I have heard from a couple of other jurors, but he has admitted he would accept a bribe to change his mind." "[W]e have all said our mind's made up, and he just refuses to listen to the reasons why we feel that [Eldridge] would be guilty or not guilty, and that's the end of the story. [¶] He just says, 'My mind's this, I am not going to change it. I'm not going to do my job by keeping an open mind.' [¶] . . . . [¶] For the most part, we would have been done the same day that we went in deliberations . . . or early the next day."

The foreperson indicated that the jury had decided on three of the counts. "[P]ersonally I feel if we . . . allow him to be

excused and allow one of the alternate juror. we can get a decision by the end of the day on all the counts. . . . [¶] . . . [¶] We have been in there all morning. We haven't even taken a vote yet trying to work as a team. We only do work on one level. We need to work together and see each other's reasons for what they are thinking."

"The Court: Is he refusing to communicate with you what his views are, discuss those?

"Juror Five: Kind of since -- yes. He says, 'My mind is made up, and that's the end of the story.' He refuses -- he's [sic] seems to be listening to the two men more than anything. We're saying, 'What do you think about this?' And he just says, 'Well, I don't believe anything.' And it's the end of the story. 'Now my mind's made up.'"

The foreperson was excused. In argument the prosecutor took the position Juror Twelve was "not in his right mind," and that in any event "he has refused to exercise his duty as a juror . . . to weigh and evaluate the evidence and the credibility of witnesses with impartiality." Defense counsel responded that in his view "there's merely a difference of opinion between some of the jurors regarding the validity of some of the counts. . . . [¶] . . . [T]he fact that he's made up his mind after hearing the evidence isn't certainly reason to excuse him from the jury."

After further colloquy Juror Twelve sent word he had "had a change of mind" and would like to speak to the court and "to complete his duty as a juror." He was invited in. He explained that he had discussed the matter with the other jurors and had found that other jurors "came to my aid" and asked the three

jurors to refrain from "making statements" of the kind Juror Twelve had found objectionable. He said he was prepared to listen to all the evidence, but his position as to whether he would consider other jurors' points of view was not clear: "I spent the majority of the time this morning in the general sense attempting to convey my feelings, my reasons and my opinions in regards to this case. And I believe everyone has a better understanding as to why I have formed the opinions that I have." He focused on his relief that what he had regarded as "a personal attack by those specific jurors" would now be at an end, and described his personal life in some detail. The court asked about the story of his willingness to accept a bribe to change his position, and Juror Twelve passed it off as "a joking comment."

The court led him back to whether "you already have a fixed opinion . . . ." Juror Twelve said: "I believe I have formed an opinion. I believe I have both, but I have also -- also offered all the time that anyone feels is necessary to attempt to go over all the evidence, and I will reconsider anything that's presented to me."

Juror Twelve then left the courtroom. After brief argument the trial court concluded that "I don't think the juror is participating in connection with the deliberations. He has a fixed opinion from the time he came in here, and he has not been able to discuss the matter with the other jurors in the manner that most jurors do operate. [¶] His statement that apparently was made, I gather in a joking manner. I assume that his opinion could be swayed by the money. [¶] I think the emotional breakdown that

occurred yesterd is such that it would be oper to remove the juror and call in one of the alternates." It was so ordered. Defense counsel, arguing that "basically it's just a difference of opinion," moved for a mistrial; the motion was denied.

In the context of removal of a trial juror for inability to serve, "[t]he determination of 'good cause' . . . is one calling for the exercise of the court's discretion; and if there is any substantial evidence supporting that decision, it will be upheld on appeal. [Citations.]" (People v. Thomas (1990) 218 Cal.App.3d 1477, 1484.) Nevertheless the court's decision, and the evidence to support it, must satisfy narrow criteria: "[T]he trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality." (People v. Compton (1971) 6 Cal.3d 55, 60, fn. omitted, quoted in People v. Collins (1976) 17 Cal.3d 687, 696; cf. People v. Thomas, supra, 218 Cal.App.3d at p. 1484 ["bias may not be presumed"].)

Eldridge argues that the record does not meet these criteria.

We agree with Eldridge that the question for the trial court was whether Juror Twelve was unable to perform his duty, but we conclude that Eldridge does not assign sufficient weight to the juror's duty to deliberate with his or her fellow jurors, and that his apparent assumption that the cases required demonstration as a matter of law that Juror Twelve was unable to perform that duty is incorrect.

Jurors are not required, and may not be directed, to agree with one another: They cannot (for example) be instructed to consider the numerical division of the jury in forming or reexamining their views. (People v. Gainer (1977) 19 Cal.3d 835, 852.) But jurors are required to deliberate: Each juror must not only fully and candidly state his or her own views of the evidence and the issues but also listen to the views of other jurors and be prepared to reconsider his or her own views if the views of others suggest that reconsideration is appropriate. "At the heart of [the] right to a unanimous verdict is the defendant's right to have the jury reach a verdict, if they can, only after the jury has deliberated on the evidence." (People v. Peters (1982) 128 Cal.App.3d 75, 90.) In the very case that gave rise to the "Allen charge" our Supreme Court later disapproved in People v. Gainer, supra, the U.S. Supreme Court stated perceptions that remain valid: "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. . . . . It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself." (Allen v. United States (1896) 164 U.S. 492, 501-502; cf. People v. Peters, supra, 128 Cal.App.3d at p. 90.) "Deliberation must be the very essence of the jury's function." (People v. Peters, supra, 128 Cal.App.3d

at p. 90; cf. also People v. Oliver (1987) 19[illegible] Cal.App.3d 423, 429-431; People v. Bruneman (1935) 4 Cal.App.2d 75, 80-81; People v. Collins (1976) 17 Cal.3d 687, 693; People v. Selby (1926) 198 Cal. 426, 439.)

The jurors were instructed, in the language of CALJIC Nos. 17.40 and 17.41, to deliberate with one another. It was each juror's duty to do so.

We are satisfied that the record fully justifies the trial court's finding that Juror Twelve could not or would not deliberate.

No one has contradicted the foreperson's testimony that Juror Twelve "walked in the jury room, said, 'My mind is this. I'm not going to change it. I'm not going to listen to anybody. That's the end of the story." Juror Twelve himself acknowledged that "I have already expressed my opinions on all twenty-two counts and the reasons why," that "at this time, I will not change," and that "[t]hey wanted to throw me out the first hour I was in there." The foreperson attributed to him a statement that "'My mind's this, I am not going to change it. I'm not going to do my job by keeping an open mind.'"

Eldridge suggests that Juror Twelve's subsequent indication of a willingness to proceed should have sufficed to make clear that he was in fact able, and willing, to deliberate. We find the suggestion unpersuasive. Juror Twelve said that he had now received assurances that he would be treated with a more acceptable degree of respect, and therefore that he would be more comfortable in the jury room and could continue as a juror. But the court could properly have deemed his professed willingness to

"reconsider anythi ' that's presented to me" neither unequivocal nor persuasive in full context. In the course of discussion of his change of position Juror Twelve said among other things that he had spent "the majority of the time this morning" explaining his reasons and opinions to the other jurors, and that "I believe everyone has a better understanding as to why I have formed the opinions that I have." He mentioned that "I was asked to lie this morning. I told them I couldn't do that either, that that wouldn't provide a consistent example of the person that I am." The court asked him if he had "a fixed opinion in connection with this case?" When Juror Twelve appeared about to state such an opinion the court cut him off, admonishing him not to state his belief. Juror Twelve then said: "I believe I have formed an opinion. I believe I have both, but I have also -- also offered all the time that anyone feels is necessary to attempt to go over all the evidence, and I will reconsider anything that's presented to me."

The trial court could properly have concluded that Juror Twelve was now able to perform no more than half of his duty to deliberate: Although he was now apparently willing to state his view to the other jurors, the court could properly have concluded that he was not prepared to hear, or even necessarily to listen to, the other jurors' views. The court properly took Juror Twelve's "emotional breakdown" of the previous day into account in concluding that Juror Twelve was not "participating in connection with the deliberations."

We conclude the record shows as a demonstrable reality that Juror Twelve could not or would not deliberate and for that

reason was unable to perform his duties as a juror, and that the trial court's determination that Juror Twelve should no longer serve was justified.

b. Instruction to Begin Deliberation Anew

The Supreme Court has construed Penal Code section 1089 to provide that when a juror is substituted after final submission the court shall instruct the jury "to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (People v. Collins, supra, 17 Cal.3d at p. 694.) CALJIC No. 17.51 embodies the substance of the required instruction.

The trial court did not give CALJIC No. 17.51. Instead, having caused the alternate juror to be sworn and seated, the court admonished the reconstituted jury as follows:

"Ladies and gentlemen, where an alternate juror is seated after the case is in trial, it's necessary that the jury understand that you are to consider your deliberations that you have gone through, that they no longer exist and you treat the case as though you had -- you are here for the first time. [¶] In any event, whatever decisions or determination you have made earlier, please set those aside, and that way the juror who has

been just sworn in is in the same position that you are. So whatever you decided before, doesn't have any efficacy at this time and the alternate juror who was sworn, stands at the same position as the rest of the jurors."

The court directed a second readback of testimony the first jury had requested and heard one day earlier. The court then dealt with verdicts of acquittal the first jury had already reached (and the reconstituted jury ultimately reiterated) as to three counts, admonishing the jury that "since we are starting anew, the verdicts that you have recorded, disregard them and let's start anew in your deliberations."

Eldridge argues that the trial court's instruction was inadequate, "could only give the impression that the admonition to start all over again was hardly literal and of only casual import," and "invited" the jury "to view the court's action as a judicial imprimatur of the majority view." He notes that the reconstituted jury required only two hours to reach verdicts on all twenty-two counts. He finds "palpable" prejudice.

We disagree with Eldridge. Although we would by no means encourage trial courts, in these or any other circumstances, lightly to depart from approved forms of instruction designed to implement legislative or judicial mandates, we conclude that in this instance the court's admonitions sufficiently conveyed the substance of the instruction the Supreme Court requires. We note that the court invited counsel to comment on the admonition immediately after it was given, and that neither attorney objected or requested further instruction. We find no error.

2. Evidentiary Rulings

Eldridge argues that the trial court committed three reversible errors in admission of evidence, and that the cumulative impact of the errors was to deny him due process.

a. "Bad things"

Yvonne testified that on her first visit to Eldridge's house she felt trapped and afraid in the face of words, acts, and demeanor from which she understood that Eldridge would not let her leave and would insist that she perform sexual acts with him. She enumerated the circumstances. The prosecutor then asked: "Was there any other reason that you were afraid of him that you have not told us yet?" Yvonne replied: "Things I have heard that might be irrelevant, but I have heard a lot of bad things about him and what he has done."

Defense counsel objected and moved to strike the answer "as to what she has heard, bad things she has heard." The prosecutor asserted that the testimony "is not offered for the truth of the matter but for her state of mind, terms of false imprisonment." The court ruled that the testimony could come in "for that limited purpose only." The prosecutor was then permitted, over defense objection and apparently on the same basis, to elicit Yvonne's statement that she had heard "[f]rom my sister, he has abused her physically, you know. At a friend's house there was a girlfriend who said her sister was raped by him and stuff like that. Before I even knew of him."

Eldridge argues, in the alternative, (1) that the testimony should have been excluded because Yvonne's state of mind was

immaterial and therefore her testimony as to what she had heard was irrelevant, and (2) that if this point must be deemed waived for want of a more articulate objection at trial then he was denied effective assistance of counsel. Given the potential impact of Yvonne's testimony upon the jury's consideration of all pending counts, Eldridge's arguments are not mooted by his acquittal on both counts pertinent to Yvonne.

Eldridge initially relied on the generalization that "[i]n the criminal context, the state of mind of the victim is generally not relevant to the factual issues in the case and hence is not admissible." (In re Cheryl H. (1984) 153 Cal.App.3d 1098, 1132, fn. 38.) He asserted specifically that Yvonne's state of mind was immaterial for purposes of the false imprisonment count. The People responded that Yvonne's fear of Eldridge was in fact material to the forcible oral copulation count, and that her knowledge of reports of "bad things about" Eldridge was relevant to prove the nature and extent of her fear. Eldridge replies that the fear element of oral copulation accomplished "against the victim's will by means of force, violence, duress, menace, or fear . . . " (Pen. Code, § 288a, subd. (c)) "does not refer to the mere subjective state of mind of the victim. It refers to the objective acts of the defendant that are designed to induce this fear, [which] may include . . . knowing manipulation of the victim's subjective fear."

We agree with the People's analysis. We are satisfied that the word "fear" in the quoted provision of the oral copulation statute, as in the similar provision of the rape statute (Pen. Code, § 261, subd. (a)(2)), does indeed refer to the victim's

subjective dread the perpetrator, and that to prove that the proscribed act was accomplished "by means of . . . fear" the prosecutor is entitled to prove the nature and the source of the victim's subjective fear. (Cf. People v. Solis (1985) 172 Cal.App.3d 877, 886-887; cf. also People v. Jeff (1988) 204 Cal.App.3d 309, 324-325; People v. Senior (1992) 3 Cal.App.4th 765, 776.) Yvonne's testimony was relevant and admissible. It follows that trial counsel's failure to make the objection appellate counsel would have made did not deny Eldridge effective assistance.

b. Kathryn's Several Extrajudicial Statements

Before trial Kathryn made several statements, to her boyfriend, to police officers, and to nurses, concerning what had happened to her. Many of these statements, beginning with her initial complaint to her boyfriend and continuing through her interview by Officer Phillips five months later, were admitted in evidence (over defense objection) as prior consistent statements. On appeal Eldridge asserts that only Kathryn's fresh complaint to her boyfriend should have come in, and that her subsequent statements were hearsay to which the exception for prior consistent statements could not be made to apply.

Subdivision (b) of Evidence Code section 791 provides that "[e]vidence of a statement previously made by a witness that is consistent with his [or her] testimony at the hearing is inadmissible to support his [or her] credibility unless it is offered after: [¶] . . . . [¶] (b) An express or implied charge has been made that his [or her] testimony at the hearing is

recently fabricat or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Cf. also Evid. Code, § 1236.)

It is now well established that an implied charge of recent fabrication or improper motive may be raised by "'[t]he mere asking of questions'" on cross-examination. (People v. Andrews (1989) 49 Cal.3d 200, 210; People v. Bunyard (1988) 45 Cal.3d 1189, 1209.) Eldridge is willing to assume his attorney's cross-examination of Kathryn and other prosecution witnesses did imply that Kathryn had an improper motive to conceal, from her boyfriend, both her previous involvement with Eldridge and her use of drugs. But Eldridge argues that this motive existed from the outset and thus that none of Kathryn's extrajudicial statements could meet the requirement that they have been made before the motive for fabrication allegedly arose.

The People agree that defense counsel's questions implied Kathryn had a motive to fabricate, but disagree with Eldridge as to the timing of the motive and the nature of the fabrication. In the People's view counsel implied that Kathryn had been told what to say, and had been pressed to say it, by law enforcement authorities sometime after her last extrajudicial statement. Thus, the People argue, Kathryn's extrajudicial statements predated the asserted motive for fabrication and were properly admitted as prior consistent statements.

The trial transcript lends very little support to either side's hypothesis. Defense counsel obviously wanted the jury to disbelieve Kathryn and to believe Eldridge, but it is fair to say

that his cross-exa nation of the various pro cution witnesses does not suggest a single coherent theory in derogation of Kathryn's credibility.

The first prosecution witness pertinent to the attack on Kathryn was her boyfriend; Eldridge relies heavily on counsel's cross-examination of the boyfriend to support his theory that Kathryn was motivated from the outset to lie to protect their relationship, but on its face the cross-examination suggests little more than that the boyfriend had very little pertinent information to add to what he had said on direct.

The next witness was Kathryn herself. Counsel's cross-examination of Kathryn began late in the day. In the few minutes left before the evening recess counsel picked at details of Kathryn's testimony on direct, attempted to bring her around to a version of the facts more consistent with Eldridge's, obtained an acknowledgment that she had testified inaccurately at preliminary examination, and opened the subject of her drug use, but did not otherwise suggest, explicitly or implicitly, recent fabrication or improper motive.

On the following morning Kathryn did not appear on time; in her place the People were permitted to call as a witness Officer Phillips, who had taken Kathryn's statement five months after the event. The People tendered the statement; defense counsel objected that it was hearsay. The People argued that "[i]t's prior consistent statements to rebut the charge, recent fabrication raised upon cross-examination." The trial court overruled the defense objection and Phillips was permitted to recite details from Kathryn's statement.

Kathryn the[illegible] arrived and was recalled t[illegible] the stand, and defense counsel resumed his cross-examination. Kathryn's memory appeared to have faded overnight. Counsel attempted to review details many of which Kathryn professed to be unable to recall. The first hint that counsel might suspect recent fabrication came when Kathryn suddenly blurted out that Eldridge's "wife" had "held the gun on me": Counsel asked whether she had ever mentioned a gun before and Kathryn said "I don't know, okay?" Counsel then continued to review details, essentially taking Kathryn back through her story. From time to time counsel would return to the question of Kathryn's drug use, either at the time of the attack or at the time of trial, gradually focusing on the possibility Kathryn's recollection had been adversely affected by drug use.

After one sequence in which Kathryn said among other things that "I don't want to remember a lot of stuff that . . . happened to me" and that "the whole thing just doesn't want me to remember," defense counsel asked: "In other words, basically all you can remember . . . is the very specific elements of these offenses when the D.A. asked you about, isn't that right?" Kathryn began an essentially nonresponsive answer and counsel asked if she wanted him to repeat the question. The prosecutor then objected that the question had been argumentative, the court directed counsel to reframe the question, and counsel returned to exploring such details as Kathryn could recall.

In the course of another sequence in which counsel suggested there were many occasions on which Kathryn could simply have walked away from Eldridge's house, Kathryn said: "I just

know that I tried to get out and he didn't let me get out, so -- he tied me up so I couldn't get out. Why would I want to lie about something like that?" Counsel responded "It's a good question," but then immediately went back to details.

Toward the end of his cross-examination counsel obtained Kathryn's acknowledgment that she did not immediately call the police and that she did not report she had been sexually attacked either to her boyfriend or initially to the police or hospital personnel. Kathryn testified that she led police to Eldridge's house the second night, but that "because I didn't know anything about him, they didn't do anything because I didn't know his last name." Counsel asked: "You didn't want to press any charges against him until August 31st. Isn't it true that they were on your back during that time, asking you to call, leaving messages for you, you never returned their call, never went in to see them, never would sign a complaint for months; isn't that true?" Kathryn responded: "Look, I was just really scared, okay? I'm not sure. Okay?"

After a few more questions counsel terminated his cross-examination.

It is fair to generalize that courts have been quite willing to infer, from cross-examination only slightly more focused than this, a defense charge of recent fabrication or improper motive. In this instance we could, by indulging in a similarly liberal reading of the record, divine a defense theory that the story Kathryn told Phillips in August, and ultimately told the jury at trial, was not true and had been fabricated by Kathryn on the occasion and for the purpose of the August inter-

view. Such a theory would rationalize subsequent admission, under Evidence Code section 791, of statements (generally consistent with her trial testimony) that Kathryn had made to two sexual assault response team nurses and to a police officer within the first 24 hours after she returned from Eldridge's house.

We cannot similarly rationalize admission of the August statement to Phillips: We are not persuaded by the People's hypothesis that defense counsel's questions implied a charge of additional fabrication, after the August interview, under pressure from the prosecutor. The only pertinent question on cross-examination suggested no more than that Kathryn now chose to remember no more than the bare elements of the various crimes, and this question was not asked until after the trial court had admitted the August statement over objection. In short we find no persuasive or timely showing that the August statement was made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b).) The People suggest no other basis for admission of the statement. We conclude the August statement was erroneously admitted.

But we further conclude that the error was harmless. Kathryn's trial testimony, although hesitant and inarticulate, was clear enough and was substantially corroborated and rehabilitated by the testimony of her boyfriend and of the police officer and two nurses who saw and talked with her within the first 24 hours. Only the identity of the perpetrator was not firmly fixed before the August interview, and at trial Eldridge (although he denied the charged criminal conduct) chose to admit that he had been with Kathryn, and had engaged in sexual conduct

with her, at the relevant time. It is not reasonably probable that a result more favorable to Eldridge would have been reached had the August statement been excluded. (People v. Watson (1956) 46 Cal.2d 818, 836.)

c. Testimony of Grace

In her opening statement the prosecutor referred to "another witness who was never victimized by this man but we have the same pattern of conduct. Her name is Grace . . . . She is the daughter of Janet . . . ." Defense counsel objected that such evidence would be irrelevant and prejudicial, but when the prosecutor asserted that the evidence would prove the "defendant's intent regarding his motive, plan, or scheme" the trial court overruled the objection.

The People called Grace, out of order and apparently as a rebuttal witness, during the defense case in chief. Before Grace testified the court conducted a hearing out of the presence of the jury, at which defense counsel objected that the Grace's testimony would relate to "an alleged incident involving herself as a potential victim with . . . Eldridge" in 1987, and that the evidence would be irrelevant and inadmissible under Evidence Code section 1101. The prosecutor responded that the evidence was relevant: "[T]he evidence . . . is that Janet . . . actually set up her own daughter in the exact same manner that Andrea . . . set up her sister [Yvonne] to go over to the defendant's house so the defendant would be able to have sex with her. . . . [T]he defense has put into issue consent. [¶] . . . [A]n issue is the defendant's intent, his motive, his method of operation. It is

very similar to ea of these cases the way h does it. [¶] Even more strongly, the People wish to introduce evidence that when [Grace] was over at his house, he told her that he could make her have sex if he wanted to by putting drugs in her soda, which is exactly what he did to . . . Elizabeth . . . . And I think the People are, your honor, entitled to get it in." Defense counsel replied that the prejudicial impact of the evidence would outweigh any probative value. The court concluded that "the probative value outweighs any prejudicial effect" and ruled that the testimony could come in.

Grace confirmed that she was the daughter of Eldridge's friend Janet. Over defense objection Grace was permitted to testify that when she was 17 years old Janet had sent her over to "have breakfast with Harry Eldridge," and that after Grace declined Eldridge's offers of pornographic movies and "loungerie" she "thought he got mad because he said, 'Well, if I wanted to have sex with you, I would have put something in your drink and you wouldn't know what hit you afterwards.'" According to Grace, nothing came of Eldridge's overtures and Grace simply went home.

The trial court denied a defense motion to strike this testimony. Thereafter the prosecutor encouraged the jury to use the testimony in various ways:

(1) Janet had been called as a defense witness, before Grace testified, and had undertaken to support Eldridge's exculpatory versions of the encounters with Yvonne, Kathryn, and Elizabeth. On cross-examination by the prosecutor Janet had denied setting her daughter up to have sex with Eldridge. In summation the prosecutor did not refer to the conflict between

Janet's testimony and Grace's, but did attack the credibility of Janet as "the woman who set the defendant up with her own daughter."

(2) The People's theory, suggested both in opening statement and in summation, was that Eldridge had doped Elizabeth's soda in order to have sex with her. In summation the prosecutor reminded the jury of Grace's testimony that Eldridge had said "he could put drugs in her soda. [¶] That is very significant because it fits into exactly what he did to Elizabeth later on when he got bizarre."

(3) The prosecutor also made Grace's testimony a part of her argument, in summation, that Eldridge tended to prey on women who were young or otherwise weak: "[H]e picks his women very carefully. Because he picks women that are weak to begin with. He picks women that are vulnerable, that he thinks he can control. And I guess he thought he could just keep on getting away with it. And you can see the pattern starting back in 1987. Who does he pick? Janet . . . . And she has been with him since then, virtually his slave. And he has her so enslaved that she leaves her children hungry and that she set up her own daughter Grace . . . to come over and have breakfast with this man, the defendant. And it's there that he tries to get a seventeen year old girl loungerie [sic]. He tried to make her have sex with him . . . ."

On appeal Eldridge renews objections he made in the trial court: That Grace's testimony was irrelevant and, alternatively, that any conceivable relevance the testimony may have had was outweighed by its manifest tendency to show both Eldridge and his

friend Janet in a highly prejudicial light.

Certainly none of the theories of relevance the People suggested in the trial court, implicitly or explicitly, would have overcome Eldridge's objections.

The most obvious difficulty with Grace's testimony was that on its face it tended to prove no more than that Eldridge was criminally disposed to prey on women and, for that purpose, to "put something in" their drinks. The prosecutor did not deny this implication; instead she sought to exploit it to persuade the jury that Eldridge had in fact sexually attacked Yvonne, Kathryn, and Elizabeth. But the law is clear that, subject to specific exceptions, "evidence of a person's character or a trait of his [or her] character . . . is inadmissible when offered to prove his [or her] conduct on a specified occasion" (Evid. Code, § 1101, subd. (a)), and case law has emphasized that this rule is particularly applicable to evidence which proves no more than that a criminal defendant's "disposition to commit" the act or acts charged. (Id. subd. (b); People v. Thompson (1980) 27 Cal.3d 303, 314-321; cf. People v. Tassell (1984) 36 Cal.3d 77, 83-89.)

The prosecutor's broad references to "defendant's intent regarding his motive, plan, or scheme" and to "the defendant's intent, his motive, his method of operation" were presumably attempts to invoke the equally well-established rule that even character evidence may come in if it is shown to be relevant to prove some material fact beyond mere criminal predisposition. (Evid. Code, § 1101, subd. (b); People v. Thompson, supra, 27 Cal.3d 303, 314-321; People v. Robbins (1988) 45 Cal.3d 867, 878-881; People v. Sully (1991) 53 Cal.3d 1195, 1224-1226.) But

the prosecutor's v ocused recital fell far s rt of suggesting any specific fact as to which the evidence could meet the criteria of admissibility the cases have set down.

Nor did the use the prosecutor actually made of the evidence suggest any viable theory of admissibility. That Janet might have been "the woman who set the defendant up with her own daughter" was plainly inadmissible to attack or support her credibility. (Evid. Code, § 787.) That what Eldridge said to Grace "fits into exactly" what Eldridge may later have done to Elizabeth by no means elevates Grace's testimony above proof of criminal predisposition. And surely the prosecutor's bald suggestion to the jury that Grace's experience demonstrated Eldridge's predilection for women who are "weak to begin with" simply emphasizes the People's reliance on the fallacious premise that Grace's testimony could come in to prove no more than that Eldridge was a sexual predator.

In this court the People substantially shift their legal ground. They argue, in the alternative, (1) that Grace's testimony was relevant to prove that Eldridge intended to kidnap Elizabeth and to hold her in captivity while he assaulted her sexually; (2) that the evidence was relevant to impeach, by direct rebuttal, Janet's various denials (a) of participation in sexual schemes with Eldridge and (b) of having set up Grace to have sex with Eldridge; and (3) that even if the evidence was not relevant its admission was harmless error.

It cannot be error to admit admissible evidence: So long as the evidence was in fact admissible, it is of no moment that in the trial court the proponent never called out the pertinent

theory of admissibility. But the People's new theories are by no means dispositive.

The People's first hypothesis appears to be that because Eldridge told Grace that had he been determined to have sex with her he "would have put something in your drink," it may be inferred from evidence that Eldridge did put something in Elizabeth's drink that Eldridge was determined to have sex with Elizabeth and, further, to do whatever was necessary to achieve that goal. The hypothesis is weakened by its dependence on an assumption that Eldridge's statement to Grace was something more than mere talk. The orthodox example of admissible prior conduct, particularized to this case, would be one in which it could be shown that on one or more previous occasions Eldridge had in fact achieved illicit sexual goals by doping the victims' drinks. (Cf., e.g. People v. Robbins, supra, 45 Cal.3d 867, 879-880, citing 2 Wigmore, Evidence (Chadbourn rev. 1979) § 302, p. 241.) A secondary difficulty with the People's hypothesis is that there was no real need for Grace's obviously prejudicial testimony to prove the element of Eldridge's intent to kidnap Elizabeth and to imprison her for sexual purposes: Arguably the evidence was no more than cumulative on these narrow intent issues. (Cf. People v. Thompson, supra, 27 Cal.3d 303, 318.) Eldridge's defense was that he had sufficient reason to suppose that Elizabeth was a prostitute and that their sexual activities would amount to no more than a commercial transaction. Were the jury to reject this explanation for Eldridge's admitted sexual activities with Elizabeth, it would find ample evidence, quite apart from Grace's testimony, to prove intent and every other

element of each of the charges arising out of the episode. Disposition of the charges would ultimately turn not on Eldridge's intent but on the parties' relative credibility.

The weakness of the People's theory, on appeal, that Grace's testimony could come in to rebut Janet's denials of participating in sex schemes with Eldridge and, specifically, of having set Grace up for Eldridge is that in the context of the full record Janet's denials were essentially collateral matters, not directly involved in the issues of Eldridge's guilt or innocence. Impeachment on collateral matters is not impermissible (cf. generally 3 Witkin, Cal. Evidence (3d ed. 1986) §§ 1982-1995, pp. 1939-1955), but it is at best problematic whether the probative force of the collateral impeachment in this case could rationally be said to outweigh its manifest tendency to prejudice the defense.

We perceive one narrow theory of relevance that the People have not pursued either in the trial court or here: The inference, available from Elizabeth's testimony, that Eldridge had in fact doped her soda was at once damning and consistent with other details of Elizabeth's frightening account. Eldridge could have been expected to deny that he had doped the drink, and in fact he ultimately did so. In this light Grace's testimony, insofar as it tended to suggest that Eldridge was at least aware of the concept of doping a victim's drink, had some tendency in reason to support the credibility of Elizabeth's account (and, by the same token, to devalue Eldridge's denial). Evidence relevant to credibility is by definition relevant evidence. (Evid. Code, § 210.)

Grace's testimony was at best only marginally relevant. Its obvious substantial potential for prejudice to the defense argued strongly for its exclusion.

But the potential prejudice was manifestly no more than cumulative of that which inevitably arose from other, legitimate, evidence. Every inference that might have been drawn from Grace's testimony was already available: Grace's brief testimony added little of weight to the irresistible perception that unless Eldridge's various stories could be believed then he was indeed a chronic abuser of women. In relative terms the testimony was innocuous: Eldridge committed no apparent crime against Grace, who apparently was able to extricate herself simply by refusing his overtures. The trial court could properly have admitted Grace's testimony for such limited probative force as it might have. In any event, any arguable error was harmless and there was no miscarriage of justice. (Cf. Evid. Code, § 353, subd. (b).)

d. Due Process

On the basis of the conclusions we have stated we reach the further conclusion that the cumulative effect of the enumerated evidentiary rulings did not amount to a denial of Eldridge's due process rights. We are satisfied that Eldridge received a fair trial.

3. Sentencing

After the jury returned its verdicts the probation department prepared a report that recommended in strong terms that Eldridge be severely punished. Among other things the

report concluded that under subdivision (d) of Penal Code section 667.6 the court would be required to impose full separate consecutive terms for all of the sex crimes of which Eldridge stood convicted. In remarks at the sentencing hearing the prosecutor agreed with the probation officer that "the court has no discretion but to sentence this man consecutively . . . ."

The court announced its intention "to follow the recommendation of the probation officer," and called upon the probation officer to set forth the recommendations. As the probation officer did so, including recommendations for full consecutive terms for each of the sex crimes, the court occasionally interjected to adopt individual recommendations. At the conclusion of the probation officer's reading the court said: "Let me say I am in agreement fully with the recommendation that probation has made in this case. I think that the evidence during the trial warrants the full and consecutive sentencing."

Citing this court's opinion in People v. Fernandez (1990) 226 Cal.App.3d 669, 678-679, and asserting a number of sentencing errors recommended in the probation report and adopted by the court, Eldridge argues that it was error for the trial court to sentence him by what "amounted to an incorporation of the probation report . . . ." Among other things Eldridge asserts that to impose mandatory consecutive sentences under subdivision (d) of section 667.6 the trial court had "fact finding obligations" that simple incorporation of the probation report did not discharge. Separately, Eldridge argues that the record contains no substantial evidence to support findings, essential

to mandate terms under section 667 (b) to (i) in section 667.6 as to sex crimes committed against a single victim, that the crimes had occurred on separate occasions.

The People concede Eldridge's last point: "Although two victims were involved and clearly some of the offenses occurred on 'separate occasions,' the record does not demonstrate the sequence of events with sufficient detail to show all of the sex offenses fell within subdivision (d). Since the present record does not establish when each sex offense occurred during the periods of captivity it is not possible for this court to agree that each offense occurred on a separate occasion. Accordingly, the case must be remanded for resentencing."

The People's concession is appropriate. (Cf. People v. Corona (1988) 206 Cal.App.3d 13, 17-18.) In light of it we perceive no need to address in detail the additional sentencing errors Eldridge asserts.

The adjudications of guilt are affirmed. The sentence is vacated, and the matter is remanded for complete resentencing in accordance with law.

Bamattre-Manoukian, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.

PEOPLE V. ELDRIDGE
No. H008751

[CCP Sec. 1013a(2)]

The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 2054 University Ave., Suite 501, Berkeley, California; that he served a copy of the following documents:

PETITION FOR REVIEW

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Berkeley, California on June 15,1993, addressed as follows.

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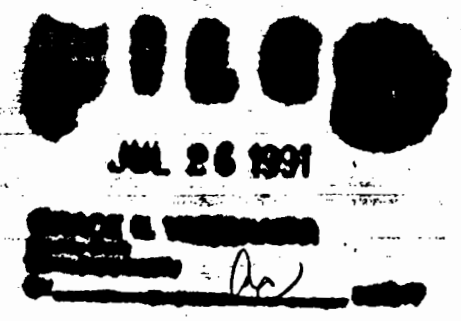
EXHIBIT "K"



IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,

vs.

HARRY LEE ELDRIDGE, DEFENDANT,

REPORT OF
PROBATION OFFICER
No.: 142464
July 26, 1991
L. Darling, D.A.
R. Cherrington, Atty.

COURT DATA

SENTENCING COURT: Honorable John Schatz

COURT OF CONVICTION: Honorable John Schatz

CHARGE:

Count Four, Section 245(a)(1) of the Penal Code (Assault with a Deadly Weapon -- Other than a Firearm, to wit: a Flashlight)

Personal Use of a Deadly and Dangerous Weapon within the meaning of Sections 667 and 1192.7 of the Penal Code (Serious Felony), found true

Counts Five, Six, Thirteen, Fourteen & Fifteen, each Section 261(2) of the Penal Code (Rape)

Counts Seven, Eight, Twenty, Twenty-One & Twenty-Two, each Section 288a(c) of the Penal Code (Oral Copulation by Force)

Counts Nine & Sixteen, each Section 136.1(c) of the Penal Code (Dissuading a Witness - Force)

Count Ten, Section 236/237 of the Penal Code (False Imprisonment)

Count Eleven, Section 245(a)(1) of the Penal Code (Assault with a Deadly Weapon -- Other than a Firearm, to wit: a Sword)

Personal Use of a Deadly and Dangerous Weapon within the meaning of Sections 667 and 1192.7 of the Penal Code (Serious Felony), found true

Count Twelve, Section 245(a)(1) of the Penal Code (Assault with a Deadly Weapon -- Other than a Firearm, to wit: Fists)

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464 July 26, 1991

Count Nineteen, Section 236/237 of the Penal Code (False Imprisonment)

DATE OF OFFENSE:

(Counts Four, Five, Six, Seven, Eight, Nine & Ten)

Between March 1, 1990 and March 31, 1990

(Counts Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Nineteen, Twenty, Twenty-one and Twenty-two)

Between August 1, 1990 and August 31, 1990

DATE OF ARREST: August 24, 1990 (SJPD)

CONVICTION: Found Guilty by Jury Verdict on May 3, 1991

CONDITIONS: None

REMAINING CHARGES:

Ct. 1, Sec. 236/237 PC (False Imprisonment), Ct. 2, Sec. 288a(c) PC (Oral Copulation - Force), Ct. 3, Sec. 245(a)(1) PC (Assault with Deadly Weapon -- Other than Firearm, to wit: a Sword), w/ personal use of Deadly and Dangerous Weapon w/in mean of Sec. 667 & 1192.7 PC, Ct. 17, Sec. 207(a) PC (Kidnapping), Ct. 18, Sec. 203 PC (Mayhem - General), found not guilty by jury verdict

DAYS IN CUSTODY: 337 actual days, 168 days - 4019 PC, 505 total days; presently in custody

AGE & DATE OF BIRTH: 40; November 3, 1950; IN

CODEFENDANTS & STATUS: None

SUPPLEMENTAL INFORMATION:

The defendant is scheduled for a Violation of Probation Hearing on July 18, 1991 involving Information Number 134768. In that case, the defendant was originally granted three years Formal Probation following a conviction of Section 11377(a) of the Health & Safety Code (Possession - Controlled Substance).

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464

July 26, 1991

SUMMARY OF OFFENSE:

(Counts Four through Ten)

Source: San Jose Police Department Crime Report Number 90-662-0195.

Between March 1, 1990 and March 3, 1990, thirty-four-year-old Kathryn J. was held against her will, beaten, and sexually assaulted by the defendant, an acquaintance.

At the time of the report, on March 3, 1990, police noticed the victim had a cut on the back of her head which required medical attention. She also appeared to have been tied up as she had red marks on both wrists. The victim had visible scratches and abrasions on her face and neck and had bruises and a large welt on her back.

The victim told police she went with the defendant and his girlfriend on March 1, 1990, to "party." Suddenly, the defendant "went off" and attacked her. The victim said the defendant kept calling her a "stupid bitch" and said she was "spaced out."

It should be noted the victim was reluctant to talk with police and had to be encouraged to submit to sexual assault examination.

Following the sexual assault examination, police talked with the victim again. At that time, she related the defendant picked her up Thursday night at approximately 10:00 p.m. He said he had to go home to pick up his girlfriend and was going to turn himself into the jail staff at Elmwood to serve a sentence on a crime he had previously committed. When they got to the defendant's home, the victim, defendant, and his girlfriend began to "party." During the party, the defendant took the victim into his bedroom allegedly to show her his guitar. At that point, he pulled out a "hype kit" and "shot" the victim with some crystal methamphetamine. He also injected himself with the drug.

The victim said she got very high from the drug and lost the sensation of feeling and awareness of time. She has a vague recall that the bruises on her back occurred when the defendant hit her with a framing hammer. Further, he injected methamphetamine more than once, but the victim could not recall how many times.

The defendant's girlfriend came into the bedroom and the defendant exposed his penis to the victim and said, "suck my cock." The victim hesitated at which time the defendant told his girlfriend to orally copulate him. She did so immediately and

then the defendant ordered the victim to do the same. When she said, no, the defendant slapped her on the face.

Sometime later the defendant made the victim take off her clothes and lie on her back in the kitchen with her leg propped up against the wall. He tied her wrists and ankles with some type of cord and looped the cord from her ankles to her hands and let her lie there for a while. He would occasionally walk up to the victim and step on her stomach or slap her.

A short while later while the victim was still tied, the defendant put a wash cloth into her mouth and secured it by wrapping tape all around Kathryn's head.

Sometime later the defendant untied the victim and took her into the bathroom. He again exposed his penis and told her, "get down on your knees." At that time the victim complied and knelt down orally copulating the defendant for approximately forty-five minutes.

The victim tried to escape out the front door thinking the defendant had fallen asleep. However, he caught her and blocked the door. She tried to jump out a window, but the defendant grabbed her. He hit her on the head with a metal flashlight and hit her on the back with a hammer. The victim's head began bleeding profusely.

Kathryn told police the defendant had sexual intercourse with her more than twice, but she did not know the exact number of times. The sexual intercourse took place on the floor of the bedroom.

The victim recalled that while she was tied up in the kitchen, naked, the defendant's girlfriend's fourteen-year-old son walked in. The defendant asked the boy what they should do with her, but the boy did not respond.

Later when the defendant did fall asleep, the victim wrapped a blanket around her body and ran out of the house. She was picked up by an unidentified male who took her home.

Police took the victim in the field to see if she could locate the defendant's home. She pointed out a home which looked familiar and police ran car registrations on the vehicles parked in front. The defendant's girlfriend's vehicle was in the driveway, but the defendant's car was not there.

In a later interview, the victim estimated, conservatively, that during the three days she was held captive she, at least twice daily, was raped by the defendant, forced to orally copulate him and raped with a foreign object (finger).

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464 July 26, 1991

Kathryn said she did not want to testify against the defendant as she feared he might harm her family.

(Counts Eleven through Sixteen, Nineteen through Twenty-two)

Source: San Jose Police Department Crime Report Number 90-236-0379.

On August 24, 1990, fourteen-year-old Elizabeth S. reported she was falsely imprisoned by the defendant who injected her with methamphetamine and forced her to take off her clothes and masturbate while he took photographs. Additionally, he forced her to have sexual intercourse, orally copulate him, and he sodomized her. He beat the victim with a closed fist and kicked her in the stomach. He choked Elizabeth and refused to give her food during the four days he held her captive. Defendant Eldridge inserted a safety pin into the nipple of the victim's left breast and put an earring into the opening. The defendant told Elizabeth if she did not comply he would kill her, her mother, her boyfriend, and set fire to her grandmother's home (where the victim resides).

The victim elaborated telling police on August 20, 1990, somewhere around 11:30 a.m., the defendant came to her home as they were going to attend a movie together. She had met him two to three weeks prior and gone for a ride with him in his car.

On the way to the movies, the defendant took the victim to a small convenience store and purchased a "Jolt" cola. He opened the drink before he got back to the vehicle and gave it to Elizabeth to drink. After she consumed the beverage, she started feeling sick. She said she felt as if she was having a heat stroke. He took her back to his home and took her into his bathroom which is connected to the bedroom and injected her with an unknown substance against her will. Elizabeth said she immediately felt her veins burn, her lungs felt like they would collapse and there was a sour taste in her mouth. She felt intoxicated. It was at this time the defendant forced her to undress and masturbate while he took photographs of her.

During that same evening, the defendant took Elizabeth for a ride in his car claiming he would take her home. He then added a stipulation that she would have to orally copulate him before he took her home. She complied and,the defendant said, "You're not going home until I say I'm done with you." He then drove back to his home and forced the victim to have sexual intercourse with him.

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464 July 26, 1991

Over the next few days, the defendant continued to forcibly inject the victim with a narcotic substance, raped her, forced her to orally copulate him, and beat her. At night she was bound with black tape and her mouth was taped shut.

The victim told police the defendant was actually a friend of her mother's. When she had met him several weeks before the assault he was very nice to her and let her drive his car for a couple hours. He did not try anything sexual with her and she was not suspicious of him in any way. Thinking back on it, she believed when he picked her up the day the assault began and handed her the open can of soda, she believed he must have put something in the drink to make her ill so he could take her home.

Police had the victim roll up her sleeve and they saw four injection marks centered over her veins. She elaborated stating the defendant got a hypodermic needle and spoon out of the bathroom cabinet and took some white powder and put it on the spoon. He then mixed some water and the powder and injected the victim.

The victim said a short time after she was injected with drugs, a lady with blonde hair walked into the room and orally copulated the defendant. When the woman left, the defendant grabbed Elizabeth by the throat and started choking her. He told her, "you came here because you wanted to suck my dick." The victim feared the defendant was going to kill her.

The defendant then put on a pornographic movie and took off all his clothes. He ordered the victim to take her clothes off and she complied as she feared he would beat her up. He then started masturbating and grabbed her by the hair making her suck on his penis. He then hit the victim in the head repeatedly and inserted his penis into her vagina.

The victim stated the defendant injected her with more drugs late Monday night. They stayed up all evening and he took nude pictures of her and forced her to have sex with him an unknown number of times.

Later in the evening, another woman came in and asked the defendant if this was the same girl as before. He said no and ordered the girl to perform sexual acts with the victim. Elizabeth said the girl came over and sucked on her nipples and as she started to have oral sex with her, Elizabeth pulled away. The defendant then handcuffed Elizabeth and tied up her legs. She spent the night that way in the bathroom.

The following morning, the defendant woke up and accused the victim of taking his drugs. He threatened he would kill her if

he found she had done this. She told the defendant she was tied up all night and could not have taken his drugs. He told her he was just kidding and untied the victim, injecting her again with drugs. He attempted to have anal intercourse with the victim, but it caused her too much pain. He also wanted to use a dildo, but she told him no. She said he told her "I'm your master, you're my slave."

On Thursday, the defendant took a large sword and put it to the victim's throat. He got some black, sticky tape and taped Elizabeth's eyes, mouth, hands, and legs. He then removed the tape from her eyes and said, "I want you to watch yourself die." He started to choke the victim and asked, "Are you going to tell me who took the drugs?"

The defendant then handcuffed the victim and dragged her to his car. He drove to an unknown area and threw her out of the vehicle taking the handcuffs off her. Once she was on the ground, he said, "This is what you deserve cunt." He then kicked the victim several times in the stomach. He reached down and punched her in the head and said if anyone found out about what happened he would blow up her grandmother's house and kill them all. He left her there and she was able to loosen the tape on her hands and get free. She hitch-hiked a ride and when she arrived at a friend's home contacted her grandmother and uncle. Her uncle contacted the police.

In further discussion with the victim, police learned the defendant while at his home, inserted a safety pin into the victim's nipple on her left breast. He put an earring into the nipple. Further, during this ordeal, during the four days the victim was held against her will, she was only given two bananas and one glass of milk.

Police learned the defendant's identity and placed him under arrest. They learned the defendant was on probation for drug offenses. Further, he had a search clause as a condition of his probation contract. During the arrest procedure officers saw in plain view, a roll of black tape, pieces of discarded tape with brown hair stuck to it, an oriental sword, and a television with pornographic tapes.

Following his arrest on August 24, 1990, police brought the defendant to the Sexual Assault Unit for interview. Prior to police entering the interview room, but while the tape was running, the defendant was talking to himself. Defendant Eldridge stated, "I'm getting beat up by a little girl, son-of-a bitch!"

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464

July 26, 1991

The defendant wanted to talk with police, "informally, off the record." When the officer said there was no such thing as "off the record" the defendant then stated he would be crazy to talk without an attorney. He then made unsolicited comments stating he did nothing to hurt the victim. He said she told him she was beaten up and left for dead under a bridge near Willow Street.

For the next five minutes, the defendant sat in a room alone talking to himself. He rambled on about being, "set up" he implied the victim's grandmother was working her out of a "Whore House."

As the defendant was taken to the inside lower booking at the main jail, he spontaneously stated he did not do anything the victim did not want to do. He was given a copy of the booking sheet and after seeing the charges stated, "This is more serious than I thought."

VICTIM'S STATEMENT: (Appearance Unknown)

Both victims were sent written notification of these proceedings and their rights pursuant to Section 1191.1 of the Penal Code. Telephone contact was made with each victim and a personal interview was requested.

Kathryn refused to meet with the undersigned officer indicating she was tired of this whole thing and wanted it over. She said, "He is sick and I want him locked up." She described the defendant as a "small time Manson."

An interview was scheduled with Elizabeth, but when the undersigned arrived, the victim was not at home.

With the assistance of the investigating police officer, the undersigned made telephone contact with Elizabeth on July 12, 1991. She indicated a desire to have the defendant confined for a lengthy prison term with the hopes he would die during his imprisonment. She feels he is an evil man who presents a danger to women.

DEFENDANT'S STATEMENT: (Requested - Not Received)

The defendant began the interview by declaring his innocence. He feels he was "set up" by Elizabeth's grandmother. He said he had just called her to get a "hooker" for the night. Elizabeth's mother was in jail, so her grandmother "sold" her to the defendant.

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464 July 26, 1991

Defendant Eldridge said Elizabeth had a "mental breakdown" while she stayed with him. It is not his habit to have sex with children. Thus, in the three days he spent with her he tried to help her. He said, "I've always tried to help children. I tutored my last girlfriend's son who was dyslexic and got him up to grade level."

In regard to the victim Kathryn, the defendant said he never had sex with her. He said, "she was so out of it, she left nude. Maybe the guy who picked her up did bad things to her, but not me."

The defendant acknowledged he had a drug problem in the past. However, he refused to discuss the specifics of his use/abuse. He said he has been "cleaned up" since 1986 and is very proud of himself. He said he did not have to go to a program or anything which shows what a strong person he is. So, the claims from the victim that he gave them drugs is a lie.

In discussing his life, the defendant said, "I had a beautiful childhood. My father always took care of me. Anyone who knows me, knows this is not me." The defendant hopes the Court will review his arrest history which he claims is inconsistent with a man who rapes.

It was the defendant's statement he has lost faith in the "system" since he was found guilty of these horrible crimes. He expressed disappointment in the District Attorney and said, "She knows better, she knows I'm not guilty. She must be crusading for something, women's lib or whatever. I've been praying for her ever since I figured this out."

The defendant does not want to spend the rest of his life in prison. He hopes the verdict will be overturned during the appeal process and the truth will set him free.

INTERESTED PARTIES:

Since he was first arrested in 1972, the defendant has accumulated four misdemeanor and one felony convictions. His only grant of Formal Probation involves the Violation of Probation matter alluded to in Supplemental Information.

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464 July 26, 1991

DATE:	DKT #/ INFO #	CHARGE:	DISPOSITION:
1/11/90	134768	11377(a) H&SC	3 yrs prob; 4 mos CJ, $100RFF. $100DPF; S&S; Chem Test; Jail term stayed 5/1/90

Numerous character reference letters have been submitted by friends and family attesting to the defendant's good qualities.

DISCUSSION:

Judicial Council Rules 414, 421 & 423: (Attached)

Enhancements: (None)

Case Evaluation:

Harry Lee Eldridge is a forty-year-old man who appears for sentencing on multiple sex, assault, and false imprisonment charges. The defendant was serving felony probation for drug charges at the time he was arrested.

The defendant is a single man who graduated from Camden High School in 1969. He has been self employed for the past six years in "Design Electronics."

The defendant's sadistic and barbaric attack on these women, demonstrates he poses a significant threat to the community. He drugged them, beat them, and sexually assaulted them while holding them for days against their will. He tied them with cords and taped their eyes and mouths closed.

One of the victims so feared for her life she left the defendant's home wrapped only in a blanket. The teenage victim was left tied up near a creek, presumably to die.

Both victims were threatened that they and their loved ones would be harmed and killed if the police learned what the defendant had done.

Defendant Eldridge's crimes are not only vicious, but evil. He seems to be a man without a conscience. He is a man who cannot be allowed the opportunity to plan and calculate similar crimes in the future. He must be held in a secure setting for a significant number of years as allowed by statute.

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464

July 26, 1991

The defendant is ineligible for probation pursuant to Section 1203.065(a) of the Penal Code. Given the nature of the crimes, probation would not be considered in any event.

The aggravated terms are recommended as the manner in which the crimes were carried out indicates planning, sophistication, or professionalism. Further, the defendant was on probation at the time the crimes were committed and the victims were particularly vulnerable in that they were drugged and bound unable to escape the assaults.

Full term consecutive sentencing is mandated pursuant to Section 667.6(d) of the Penal Code in Counts Five through Eight, Thirteen through Fifteen and Twenty through Twenty-two as the crimes involved different victims and the multiple crimes as to each individual victim were committed on separate occasions as "the defendant had a reasonable opportunity to reflect upon his actions and nevertheless resumed sexually assaultive behavior." (Judicial Council Rule 426)

Full Midterm consecutive sentencing on the Dissuading a Witness charges are mandated pursuant to Section 1170.15 of the Penal Code. Even if not mandated, said sentencing would be recommended as the crimes and their objectives were predominently independent of each other and were committed at different times.

SUGGESTED TERM:

CRIME	MIT	AGG	RANGE	ENHANCEMENT	TOTAL TERM
Ct. 4, 245(a)(1) PC	No	Yes	2,3,4 yrs	None	4 yrs
Ct. 9, 136.1(c) PC	No	Yes	2,3,4 yrs	None	3 yr c/s (1 yr stayed)
Ct. 16, 136.1(c) PC	No	Yes	2,3,4 yrs	None	3 yrs c/s (1 yr stayed)
Ct. 11, 245(a)(1) PC	No	Yes	2,3,4 yrs	None	4 yrs c/c
Ct. 12, 245(a)(1) PC	No	Yes	2,3,4 yrs	None	4 yrs c/c

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464 July 26, 1991

Ct. 10, 236/237 PC	No	Yes	16 mos, 2,3 yrs	None	3 yrs c/c
Ct. 19, 236/237 PC	No	Yes	16 mos, 2,3 yrs	None	3 yrs c/c
	TOTAL TERM PER SEC. 1170.1 PC				10 yrs
Ct. 5, 261(2) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 6, 261(2) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 7, 288a(c) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 8, 288a(c) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 13, 261(2) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 14, 261(2) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 15, 261(2) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 20, 288a(c) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 21, 288a(c) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
Ct. 22, 288a(c) PC	No	Yes	3,6,8 yrs	None	8 yrs c/s
	TOTAL TERM PER SEC. 667.6(d) PC				80 years
				TOTAL TERM;	90 years

In the Case of: HARRY LEE ELDRIDGE
Charge: 2 cts: 245(a)(1) PC, 5 cts: 261(a) PC, 5 cts: 288a(c) PC, 2 cts: 136.1(c) PC & 236/237 PC
Info. No.: 142464

July 26, 1991

RECOMMENDATION:

1. Probation be denied.

2. The defendant be committed to the California Department of Corrections for ninety (90) years.

3. The defendant be advised of a subsequent three (3) year period of Parole Supervision.

4. A fine of $100 be imposed pursuant to Section 290.3 of the Penal Code.

5. A Restitution Fine of not more than $10,000.00 be imposed pursuant to Section 13967 of the Government Code.

6. Restitution as determined by the Court.

NOTE: Attorney's fees if appropriate.

Respectfully submitted,

PEDRO R. SILVA, Chief
Probation Officer

Diana Cunningham by JMA
Diana Cunningham, Deputy
Probation Officer

DC/ng
Attachments

Reviewed by:

James W. Grubbs
Supervising Probation
Officer - Ext. 2137

The above report has been read and considered by the Court.

JOHN SCHATZ
Judge of the Superior Court
Santa Clara County, California

SOCIAL DATA

NAME: HARRY LEE ELDRIDGE DATE: 7/26/91 #'(s): 142464

AGE: 40 DOB: 11/3/50 PLACE OF BIRTH: Indiana

CITIZENSHIP: U.S.A. ALIEN REGISTRATION #: N/A

SEX: Male HEIGHT: 6'0" WEIGHT: 200 HAIR: brn EYES: brn

LENGTH OF RESIDENCE IN USA: Life CALIF: 38 yrs S. CLARA CO: 38 yrs

CURRENT ADDRESS: 5179 Derek San Jose, CA

RESIDES WITH: Janet Victoria TELEPHONE: None

ADDRESS AT TIME OF OFFENSE: same

EDUCATION: Grade Completed: 12th Date: 1969 Degrees: HSD
School: Camden HS

PARENTS	Name	City & State of Residence	Telephone No.
Father:	Harry Eldridge	deceased 1976	
Mother:	Bobbie Eldridge	unknown	
Stepfather:			
Stepmother:			

BROTHERS & SISTERS:

Name:	Age:	Sex:	City & State of Residence:
Shiela	42	F	Lodi, CA
Merlin	20	F	deceased (drowned 1975)

MARITAL STATUS: (Include Common-Law): Single
Spouse's Name: Age: Date of Marriage:
Address: Telephone:

PREVIOUS MARRIAGES: (Include Common-Law):

Name:	Dates:	Comments:
None		

CHILDREN:

Name:	Other Parent:	Age:	Sex:	Lives With:	Supported by:
None					

EMPLOYMENT/FINANCIAL STATUS

NAME: HARRY LEE ELDRIDGE DATE: 7/26/91 #(s): 142464

EMPLOYMENT HISTORY: (Listed most recent to least recent)

Employer: Self Employed
City & State:
Reason for Leaving:
Dates: 6 yrs
Salary: Varied
Occupation: Design Elec

Employer: Dean Markcey
City & State: Santa Clara, CA
Reason for Leaving: quit - no pay
Dates: 1986
Salary: $1000/wk
Occupation: Market Survey

Employer:
City & State:
Reason for Leaving:
Dates:
Salary: $
Occupation:

Employer:
City & State:
Reason for Leaving:
Dates:
Salary: $
Occupation:

Employer:
City & State:
Reason for Leaving:
Dates:
Salary: $
Occupation:

Employer:
City & State:
Reason for Leaving:
Dates:
Salary: $
Occupation:

TRAINING PROGRAMS

Program:	Dates:	Certificate of Completion
Santa Clara City College (Blueprint/Sheetmetal)	1978	yes

UNION AFFILIATION: None
Apprenticeship? N/A Journeyman? N/A

MILITARY SERVICE:

Branch:	Dates:	Type of Discharge	Rank Achieved:
None			

PRESENT INCOME: (Gross per month)
Employment: $ -0- (incarcerated) Savings: $ -0-
Spouse's Income: N/A
Other (Specify): $ -0-

MAJOR EXPENSES:
Residence: $ -0- (incarcerated) Living: $ -0- (incarcerated)
Other: $ -0- Specify:
Vehicle #1: Amount Owed: $ Make: None Lic #:
Amount Owed: $ Make: Lic #:
Amount Owed: $ Make: Lic #:

HEALTH RECORD

NAME: HARRY LEE ELDRIDGE DATE: 7/26/91 #(s): 142464

GENERAL STATUS: Good

PHYSICAL HANDICAPS: None

SCARS, IDENTIFYING MARKS: TT: left arm

DRUG USAGE: (Legal and/or illegal) Refused

ALCOHOL USAGE: None past 15 years

PSYCHOLOGICAL/PSYCHIATRIC ILLNESS: None

PRESENT TREATMENT PROGRAM: None

PAST TREATMENT PROGRAM(S): None

CRIMINAL RECORD DATA

CII#: M4111793 FBI#: 109988L2 DMV#: S0033037 CEN#: 9048261
PFN#: ANY400 SS #: 555-82-2985 and#: and#:

RECORDS (Indicate if Attached, Requested or None)

Juvenile: N/A Adult: Attached Driving: N/A Other: None

NUMBER OF PRIOR CONVICTIONS
Juvenile: N/A Adult Misdemeanors: 4 Adult Felonies: 1

PRIOR STATE COMMITMENTS CYA: 0 CDC: 0 CRC: 0
Another State? 0 Federal? 0

ON PAROLE
Agent's Names: N/A

ON PROBATION
Officer's Name: R. Rebollar

OTHER MATTERS PENDING: VOP #134768, July 18, 1991

EXHIBIT "L"

No. H032586

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HARRY ELDRIDGE,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA,
Respondent Court.

PEOPLE OF CALIFORNIA,
Real Party.

Docket No. _____

/

PETITION FOR REVIEW

Review of Order of Denial of
Petition For Writ of Mandate
by the California Court of Appeal
Sixth Appellate District

Harry Eldridge H-06424
Mule Creek State Prison
P.O. Box 409060, C-13-244-L
Ione, CA 95640

By Person In State Custody

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases:

Federal Constitution

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HARRY ELDRIDGE,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA,
Respondent Court.

PEOPLE OF CALIFORNIA,
Real Party.

Docket No. _____

No. H032586
(Santa Clara County
Super. Ct. No. 142464)

PETITION FOR REVIEW

. . .

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Pursuant of rule 28 of the Rules of Court, Petitioner, Harry Eldridge, respectfully petitions the Court to review the decision of the Court of Appeal, Sixth Appellate District, filed February 15, 2008 denying petitioner's Petition For Writ Of Mandate directed to the Superior Court of California For the County of Santa Clara seeking to compel the court to correct an unauthorized sentence.

Petitioner's case raises important questions of federal and state constitutional law:

1. Does an increase in the amount of the original restitution

fine imposed after appeal, at resentencing, violate state and federal protections against double jeopardy and violate due process?

2. Is a sentencing court required to correct an unlawful sentence once the matter is brought to the Court's attention and does failure to do so violate a defendant's state and federal right to due process of law?

3. Did the Court of Appeal abuse it's discretion by denying Mandate?

STATEMENT OF THE CASE AND RELEVANT FACTS

On January 4, 1991 an Amended Information was filed in case number 142464 in the Santa Clara County Superior Court charging Petitioner with several counts of forcible rape, oral copulation and assault. (Penal Code Sections 261(2), 288a(C), and 245(a)(1)) Petitioner began trial on April 18, 1991. On May 3, 1991 the jury returned a verdict of acquital on several counts and guilty on the remaining counts. On July 26, 1991 Petitioner was sentenced to an aggregate term of 90 years in prison and ordered to pay a Restitution Fine in the amount of $100.00.

An appeal followed in the Sixth Appellate District. (H008751) That Court affirmed the conviction but remanded the case for re-sentencing; the trial court erred in the sentencing of certain of the sexual assault counts pursuant to Penal Code Section 667.6(d).

On March 4, 1994, in the trial court, Petitioner was resentenced to an aggregate term of 84 years in prison and the Restitution Fine was increased from $100.00 to $1,000.00.

A second appeal was denied in full, with the Petition to the California Supreme Court for Review being denied on March 3, 1995.

In December of 2006 Petitioner filed a Petition For Writ of

Habeas Corpus in the trial court raising several claims of sentencing errors (Claims I-IV) and Ineffective Assistance of both trial and appellate counsel. (Claims V. and VI.)

Although the arguments presented in Claims I and II of the habeas corpus petition predate the decision of the United States Supreme Courts decision in **Cunningham v. California, 549 U.S. ____ (2007), 166 L.Ed.2d 856, 127 S.Ct. 856** (decided January 22, 2007), the thrust of the argument was essentially the same. However, in Claim III of the habeas corpus petition (and material to the matters addressed herein) Petitioner alleged:

> UPON RESENTENCING THE TRIAL COURT EXCEEDED IT'S JURISDICTION, AND VIOLATED PETITIONER'S STATE AND FEDERAL RIGHT TO DUE PROCESS OF THE LAW AND TO NOT BE PUT IN JEOPARDY TWICE FOR THE SAME OFFENSE.

The trial court denied the habeas corpus petition stating that Petitioner was not entitled to relief under Cunningham because Petitioner's case was final prior to Cunningham's date of determination. This order is appended hereto and identified as Petitoner's exhibit A. The order does not address Claim III of the habeas corpus petition.

Subsequently Petitioner filed a Petition For Writ of Habeas Corpus in the California Court of Appeal, Sixth Appellate District (Docket No. H031358) raising the same claims as presented to the trial court. The petition was denied on May 2, 2007. This order of denial is appended hereto and identified as petitioner's exhibit B. The same Claims were presented to this Honorable Court in a Petition For Writ of Habeas Corpus (S152690) and was denied on October 10, 2007. The Order of Denial is attached and identified

as Petitioner's exhibit C.

No state court responded to the claim presented in Petitioner's habeas corpus petition that the increase in petitioner's restitution fine was unlawful and violated double jeopardy. Therefore Petitioner sought remedy by filing a Notice and Motion Requesting Correction of Sentence on December 31, 2007, in the trial court. A true and corect copy of this motion is appended hereto and identified as Petitioner's exhibit D. This motion requested the correction of an unlawful sentence, which can be corrected at any time; i.e., the unlawful increase of Petitioner's Restitution Fine from $100.00 to $1,000.00 upon resentencing. This motion was denied on January 29, 2008. In it's order of denial (appended hereto and identified as Petitioner's exhibit E) the Court stated that the Claims should have been presented on direct appeal or in the habeas corpus petition previously presented to the Court of Appeal, Sixth Appellate District, in case Number H031358. (See exhibit E) The claim was presented in said petition to both the trial court and the Court of Appeal.

On February 11, 2008 Petitioner petitioned the Court of Appeal, Sixth Appellate District for a Writ of Mandate directed to the trial court to compel the trial court to perform it's duty and correct an unlawful sentence. A true and correct copy of this Petition For Writ of Mandate is Appended hereto and identified as Petitioner's exhibit F. On February 15, 2008 the petition was summarily denied. The Order of Denial is Appended hereto and identified as Petitioner's exhibit G.

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ARGUMENT

I. AN INCREASE IN THE AMOUNT OF THE ORIGINAL RESTITUTION FINE IMPOSED AFTER APPEAL, UPON RESENTENCING, VIOLATES STATE AND FEDERAL PROTECTIONS AGAINST DOUBLE JEOPARDY AND VIOLATES DUE PROCESS OF LAW.

This issue is not complex. Petitioner appealed his conviction. The case was sent back to the sentencing court for resentencing on matters not effecting the validity of the original $100.00 Restitution Fine, which was lawful at the time of original sentencing. At resentencing the court increased the Restitution Fine to $1,000.00. This in unlawful as held by this Honorable Court in **People v. Hanson (2000) 23 Cal.4th 355.** In Hanson this court applied the "Henderson Rule" **(People v. Henderson (1963) 60 Cal.2d 482, 495-497)**, to a case (Hanson) which matches the facts of this case at all four points of the legal compass. In **Hanson, supra,** this Court held that to increase a Restitution Fine upon resentencing violates due process and double jeopardy.

II. A SENTENCING COURT IS REQUIRED TO CORRECT AN UNLAWFUL SENTENCE ONCE THE MATTER IS BROUGHT TO THE COURT'S ATTENTION.

A Criminal defendant has a state and federal constitutional right to a lawful sentence because the trial court has no jurisdiction to impose an unlawful sentence. There is no time limit for correcting an unlawful sentence, which may be corrected at any time. See **People v. Chagolla (1983) 144 CA3d 422, 433; People v. Scott (1994) 9 C4th 331, 354 fn.17.** The duty to correct an unlawful sentence is inferred in the holding of **People v. Superior Court (Oliver) (1933) 135 CA 562** which states that if a sentencing

court refused to correct an unlawful sentence remedy lies in a Petition For Writ Of Mandate to the Appellate Court.

III. THE COURT OF APPEAL ABUSED IT'S DISCRETION IN DENYING PETITIONER'S PETITIONER FOR WRIT OF MANDATE.

As set forth above Petitioner's only proper remedy for a trial court's refusal to correct an unlawful sentence is to seek a writ of mandate from the Court of Appeal to compel the sentencing court to perform it's duty. In this instance the Court of Appeal's failure to issue it's writ of mandate is an abuse of discretion which denies Petitioner due process of the law is obtaining the proper remedy of a corrected, lawful sentence.

CONCLUSION

For the reasons set forth herein Petitioner respectfully asks this Honorable Court to reverse the denial of the Court of Appeal and direct it to issue it's writ of mandate to the sentencing court to compel it to perform it's duty of correcting Petitioner's sentence.

Or in the alternative this Court is asked to correct the error in Petitioner's sentence on it's own motion.

The Court is further asked to provide what ever further remedy the Court deems fit.

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests that this Honorable Court take judicial notice of the record on appeal and the briefs filed and lodged in this case, exhibits in case number H031358 and S152690.

Additionally Petitioner requests this Court take judicial notice of all documents appended hereto as exhibits since all such documents are court records, orders, and relevant pleadings filed in this matter. (See California Evidence Code Sections 450, et seq.)

Dated: _____

Respectfully submitted,

_____
Harry Eldridge, In Pro Per

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.1 of the Rules of Court, I certify that this petition for review is proportionally spaced and contains 1,330 words by actual count.

Dated: _____

_____
Harry Eldridge

EXHIBIT "A"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In re	)	No. 142464
	)	
Harry Eldridge	)	Order
	)	
On Habeas Corpus	)	
	)	

Harry Eldridge (Petitioner) has filed multiple habeas corpus petitions. In the present petition, petitioner contends he is entitled to relief under the recent case of *Cunningham v. California* (2007) 166 L.Ed.2d. 856.

Petitioner's case was final prior to *Cunningham, supra*, and *Blakely v. Washington* (2004) 542 U.S. 296. Petitioner is therefore not entitled to relief.

Accordingly, the Petition is DENIED.

Date: 12 Mar 2007

PAUL BERNAL
JUDGE OF THE SUPERIOR COURT

Cc: Petitioner
District Attorney
Research
WJ (e)

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EXHIBIT "B"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re HARRY ELDRIDGE, on Habeas Corpus.	H031358 (Santa Clara County Super. Ct. No. 142464)

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Premo, Acting P.J., Elia, J., and Duffy, J., participated in this decision.)

Dated MAY 2 - 2007

PREMO, J. Acting P.J.

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EXHIBIT "C"

S152690

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re HARRY ELDRIDGE on Habeas Corpus

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

OCT 10 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

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EXHIBIT "D"

Harry Eldridge H-06424
Mule Creek State Prison
P.O. Box 409060, C-13-244-L
Ione, CA 95640

In Pro Per

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

PEOPLE OF CALIFORNIA,
Plaintiff,

v.

HARRY ELDRIDGE,
Defendant.
_____/

Case No. 142464

NOTICE AND MOTION REQUESTING CORRECTION OF SENTENCE.

TO: THE DISTRICT ATTORNEY OF THE COUNTY OF SANTA CLARA

AND THIS HONORABLE COURT:

PLEASE TAKE NOTICE: that defendant, Harry Eldridge, acting on his own behalf, hereby moves this Honorable Court for correction of an unlawful sentence, as set forth in the attached Memorandum of Authorities.

The ground for this motion is that the increase of the Restitution Fine originally imposed after direct appeal and upon resentencing violates state and federal prohibitions against Double Jeopardy.

This motion is based upon this motion, the attached

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Memorandum of Argument and Authorities and supporting Exhibits, and the entire record of this case.

Dated: _____

Respectfully submitted,

_____
Harry Eldridge, In Pro Per

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MEMORANDUM OF ARGUMENT AND AUTHORITIES

Jurisdiction:

The trial court holds jurisdiction to correct an unlawful sentence at any time the matter comes to the attention of the court. **People v. Chagolla (1983) 144 Cal.App.3d 422, 434.**

Controlling Principal of Law:

The Fifth Amendment to the Constitution of the United States and Article I, §§ 15 and 24 of the California State Constitution protest a criminal defendant from twice being placed in jeopardy. Further, the 14th Amendment to the Federal Constitution, and Article I, §§ 15 and 24 for the State Constitution guarantee a criminal defendant due process of the law. Federal Constitutional guarantees are attached to the States through the 14th Amendment.

Relevant Facts and Argument:

At the original sentencing hearing of this matter, which occurred on July 26, 1991, the defendant was ordered to pay a Restitution Fine in the amount of $100.00. (See defendant's attached exhibit A.) Upon resentencing, resulting from appellate review, the defendant was ordered to pay a Restitution Fine in the amount of $1,000.00. (See defendant's attached exhibit B.) The defendant now argues that the trial court exceeded it's jurisdiction in imposing an increased Restitution Fine after the matter was appealed and directed back to the sentencing court for resentencing on matters not effecting the validity of the original Restitution Fine imposed.

Purely for the sake of this argument defendant asserts that the original Restitution Fine was properly imposed pursuant to the law which controlled the matter during the period of time effected.

The offenses which are the basis of the judgment in question occurred in 1990. Therefore, it is the law as it existed at that time which controls this matter.

> **§ 1202.4 Restitution fine; felony convictions; waiver; probation**
>
> (a) In any case in which a defendant is convicted of a felony, the court shall order the defendant to pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code. Such restitution fine shall be in addition to any other penalty or fine imposed and shall be ordered regardless of the defendant's ability to pay. However, if the court finds that there are compelling and extraordinary reasons, the court may waive imposition of the fine. When such a waiver is granted, the court shall state on the record all reasons supporting the waiver.
> **West's California Penal Code, 1990 Compact Edition**

Government Code § 13967 (a), provides:

> (a) Upon a person being convicted of any crime in the State of California, the court shall, in addition to any other penalty provided or imposed under the law, order the defendant to pay restitution in the form of a penalty assessment in accordance with Section 1464 of the Penal Code. In addition, if the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than one hundred dollars ($100) and not more than ten thousand dollars ($10,000). In setting the amount of the fine for felony convictions, the court shall consider any relevant factors including, but not limited to, the seriousness and gravity of the offense and the circumstances

> of its commission, any economic gain derived by the defendant as a result of the crime, and the extent to which others suffered losses as a result of the crime, Such losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime, Except as provided in Section 1202.4 of the Penal Code and subdivision (c) of this section, under no circumstances shall the court fail to impose the separate and additional restitution fine required by this section. This fine shall not be subject to penalty assessments as provided in section 1464 of the Penal Code.

Defendant is cognizant of the language contained in the opinion of the Court of Appeal, in this matter, wherein the court said: "The sentence is vacated, and the matter is remanded for complete resentencing in accordance with the law", but the law is clear that this statement may only apply to that portion of the sentence which is unlawful. See **People v. Chagolla, supra,** at **434**; also **In re Sandel** (1966) **64 Cal. 2d** 412, 417-419.

It is true that California Courts have held that a criminal defendant runs the risk of having a greater sentence imposed after retrial if the original sentence is either illegal or unauthorized. See **People v Serrato (1973)** 9 C3d 753, **763.** However, Serrato, and cased of that line of reasoning, are distinctive in that the entire effected sentence was illegal or unauthorized. California Courts have also held that if only a portion of the sentence is unauthorized only that portion may be effected. See **In re Sandel**, supra. The sentencing court, following remand for resentencing, may not increase the sentence on all counts. See **People v. Price** (1986) 184 CA3d 1405. To

increase the sentence a lawful sentence upon remand for resentencing violates both state and federal safeguards against double jeopardy and exudes the odor of prosecutorial/judicial vindictiveness by additionally punishing the defendant for exercising his right to appeal from a judgment of criminal conviction. See **North Carolina v. Pearce** (1969) 395 US 711, also **Blackledge v. Perry** (1974) 417 US 21.

For controlling state authority this court need go no further than the holding of the California Supreme Court as held in People **v. Hanson** (2000) 23 Cal.4th 355 which matches the facts and points argued herein on all four points of the legal compass. The defendant in **Hanson** was originally ordered to pay a $1,000.00 Restitution Fine. On appeal the case was reversed in part and remanded for resentencing. Upon resentencing the trial court increased the Restitution Fine to the amount of $10,000.00. The defendant appealed and the California Supreme Court ruled that a Restitution fine is "punishment" for double jeopardy purposes and that an increase in statutorily mandated restitution fines upon resentencing violates prohibitions in the State Constitution against double jeopardy.

The **Hanson** facts are indistinguishable from the facts of this case. As such the sentencing court's increase of the defendant's original $100.00 Restitution Fine upon remand for resentencing violates double jeopardy and is therefore unauthorized. This court is compelled to correct this error and modify the judgment in this matter.

Further, the defendant respectfully requests this Honorable

Court to review the judgment of this case for any other sentencing errors which may have occurred.

Lastly, the defendant respectfully brings to the court's attention that he did raise this issue in a petition for writ of habeas corpus previously presented to this court. However, in an opinion dated March 12, 2007 the court ruled on the other claims presented in the petition but failed to address the matter presented herein. The defendant respectfully points out to the court that it is the duty of the court to correct an unlawful sentence when ever the matter comes to the attention of the court. See In re Sandel, supra, at pp. 417-419; People v. Chagolla, supra, at p. 434. See also **People v. Mitchell (2001) 26 C4th 181, 187.**

CONCLUSION

For the reasons set forth herein defendant respectfully prays this Honorable Court to correct the sentencing error by modifying judgment to reflect the original $100.00 Restitution Fine imposed in this case and any other errors in judgment the court may determine.

Dated: _____

Respectfully submitted,

_____

Harry Eldridge, Defendant,
In Pro Per.

EXHIBIT "E"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In re	
	No. 142464
HARRY ELDRIDGE,	O R D E R
Ex Parte	

Mr. ELDRIDGE has submitted to this Court a "Motion Requesting Correction of Sentence" in which he seeks to vacate, modify, 'correct,' reduce, waive, reconsider, or dispose of, his restitution fine/order. All requested relief or action is DENIED.

Petitioner's claim of error should have been presented to the Sixth District in either a direct appeal or in Petitioner's most recent habeas corpus petition H031358. The matter may not now be considered by the Superior Court.

DATED: 1/28, 2008

DIANE NORTHWAY
JUDGE OF THE SUPERIOR COURT

cc: Petitioner
District Attorney
Research(12-31A)
CJIC

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EXHIBIT F

HARRY ELDRIDGE H-06424
MULE CREEK STATE PRISON
P.O. BOX 409060, C-13-244-L
Ione, CA 95460

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

IN AND FOR THE SIXTH APPELLATE DISTRICT

HARRY ELDRIDGE,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA,
Respondent Court.

PEOPLE OF CALIFORNIA,
Real Party.
_____/

DOCKET NO. _____

PETITION FOR WRIT OF MANDATE

Superior Court No. 142464

Court of Appeal No.
Direct Appeal: H008751
Habeas Corpus: H031358

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT:

PETITIONER, Harry Eldridge, hereby petitions this Honorable Court for a writ of mandate directed to the Superior Court of California, in and for the County of Santa Clara, and by this verified petition represents that:

I

The facts relevant to the matters presented herein are:

On January 4, 1991 an Amended Information was filed in case number 142464 in the Santa Clara County Superior Court

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charging Petitioner with several counts of forcible rape, oral copulation and assault. (Penal Code Sections 261(2), 288a(C), and 245(a)(1)) Petitioner began trial on April 18, 1991. On May 3, the jury returned a verdict of acquital on several counts and guilty on the remaining counts. On July 26, 1991 Petitioner was sentenced to an aggregate term of 90 years and ordered to pay a Restitution Fine in the amount of $100.00.

An appeal followed in the Sixth Appellate District. (H008751) That Court affirmed the conviction but remanded for resentencing; the trial court erred in the sentencing of certain of the sexual assault counts pursuant to Penal Code Section 667.6(d).

On March 4, 1994, in the trial court, Petitioner was re-sentenced to an aggregate term of 84 years and the Restitution Fine was increased from $100.00 to $1,000.00.

A second appeal was denied in full, with the Petition to the California Supreme Court for Review being denied on March, 3, 1995.

II

In December of 2006 Petitioner filed a Petition For Writ Of Habeas Corpus in the trial court raising several claims of sentencing errors (Claims I-IV) and Ineffective assistance of trial and appellate counsels (Claims V and VI).

Although the arguments presented in Claims I and II of the petition pre-date the decision of the United States Supreme Courts decision in Cunningham v. California 549 U.S. ____ (2007), 166 L.Ed.2d 856, 127 S.Ct. 856 (decided January 22, 2007),

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the thrust of the argument was essentially the same. However, in Claim III of the writ petition (and material to this writ petition) Petitioner alleged:

> UPON RESENTENCING THE TRIAL COURT EXCEEDED IT'S JURISDICTION, AND VIOLATED PETITIONER'S STATE AND FEDERAL RIGHT TO DUE PROCESS OF THE LAW AND TO NOT BE PUT IN JEOPARDY FOR THE SAME OFFENSE.

The trial court denied the petition stating that petitioner was not entitled to relief under Cunningham because petitioner's case was final prior to Cunningham's date of determination. This order of denial, dated March 12, 2007 is appended hereto and identified as Petitioner's exhibit A. The order does not address Claim III of the Habeas Corpus petition.

Subsequently Petitioner filed a Petition For Writ Of Habeas Corpus in the California Court of Appeal, Sixth Appellate District (Docket No. H031358) raising the same claims as presented below. The petition was denied on May 2, 2007. This order of denial is appended hereto and identified as Petitioner's exhibit B. The same claims were presented the the California Supreme Court in a Petition For Writ Of Habeas Corpus (S152690) and was denied on October 10 2007. Order of denial is attached and identified as Petitioner's exhibit C.

No state writ petition has been procedurally bared as untimely.

III

On December 31, 2007, in the trial court, Petitioner filed a Notice and Motion Requesting Correction of Sentence. A true and correct copy of this motion is appended hereto and identif-

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ied as Petitioner's exhibit D. This motion requested the correction of an unlawful sentence, which can be corrected at any time,: the unlawful increase of Petitioner's Restitution Fine From $100.00 to $1,000.00 upon resentencing. This motion was denied on January 29, 2008. In it's order of denial (appended hereto and identified as Petitioner's exhibit E) the Court stated that the Claims should have been presented on direct appeal or in a writ petition previously filed in this court in case number H031358. (See exhibit E)

As presented in Petitioner's previous pleadings and argued below the increase in Petitioner's Restitution fine from $100.00 to $1,000.00 upon resentencing is unlawful and the trial court has a duty to correct an unlawful sentence at anytime the matter is presented to it. The controlling law in this matter is clear and unambiguous. The Respondent Court has failed to perform a duty the law requires it to perform. Therefore, Petitioner, Harry Eldridge, seeks and order from this Honorable Court to compel the Respondent Court to perform it's duty and correct sentencing errors in this case, as addressed herein.

IV

The parties directly effected by the present proceedings described and addressed herein are petitioner, Harry Eldridge; the Respondent Court, Superior Court of the State of California in and for the County of Santa Clara; and the party directly effected as real party in interest is the People of the State of California

All proceedings about which this petition is concerned

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have occurred within the territorial jurisdiction of the Respondent Court and the California Court of Appeal, Sixth Appellate District.

V

No other petition for writ of mandate has been made by or on behalf of this petitioner relating to this matter.

VI

Petitioner has no other plain, speedy or adequate remedy at law save by this petition for writ of mandate.

VII

Petitioner hereby requests that this Court take judicial notice of the record on appeal and the briefs filed and lodged exhibits in Case No. H031358 (Evidence Code Sections 452, 459). Reproducing the record for use in connection with this petition would entail unnecessary expense since this court and counsel for Respondent and Respondent Court already have a copy of the record and all pleadings relevant to the matters addressed herein. Petitioner further requests this Court take judicial notice of all documents appended hereto as exhibits (Evidence Code Section 450, et seq.) since all of the documents appended hereto are court records, orders, and relevant pleading filed in this matter.

WHEREFORE, Petitioner prays that:

1. This Court issue a preemtory writ of mandate directing the Respondent Court to perform its duty by correcting Petitioner's unlawful sentence as addressed herein.

Respectfully submitted:

Dated: _____

_____
Harry Eldridge, In Pro Per

VERIFICATION

I, Harry Eldridge, declare as follows:

I am the named petitioner in this cause of action. All facts alleged in the above petition and attached exhibits and argument and authorities, not supported otherwise by citation to the record or to other documents are true and correct to my own personal knowledge.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed at Mule Creek State Prison, located at Ione California on February 7, 2008 by:

_____
Harry Eldridge, Declarant

ARGUMENT AND AUTHORITIES

In Payne v. Superior Court (1976) 17 Cal.3d 908, 925, the California Supreme Court held that a writ of mandate lies generally to compel a court or its officer to perform an act that the law imposes as a duty when no plain, speedy and adequate remedy at law is available. (See also California Code of Civil Procedure, §§ 1085-1086) A writ of mandate is ordinarily not available unless it is shown that the Respondent Court has refused to perform a clear duty, unmixed with discretionary power or the exercise of judgment. See Talaferro v. Locke (1960) 182 CA2d 752, 755. Mandate lies to set aside an order or judgment that exceeds or abuses the discretion vested in the court. See: Andrews v. Superior Court (1946) 29 C2d 208; Gray v. Superior Court (2005) 125 CA4th 629, 641. Mandate is appropriate to compel a court to exercise discretion and to do so under a proper interpretation of the applicable law. See Anderson v. Phillips (1975) 13 C3d 733.

When a sentence is unauthorized by law it may be corrected at any time even without an objection. See People v. Chagolla (1983) 144 CA3d 422, 433; People v. Scott (1994) 9 C4th 331, 354 fn17. If the sentencing court refuses to correct an illegal sentence remedy lies in a petition for writ of mandate to the appellate court. See People v. Superior Court (Oliver) (1933) 135 CA 562.

Petitioner hereby incorporates by reference the facts and arguments presented in attached exhibit D and Claim III of the Petition For Writ of Habeas Corpus on file in the Respondent

Court in Case No 142464 and the California Court of Appeal, Sixth Appellate District in Case No. H031358 in support of this petiton.

This is not a complex matter. Petitioner appealed his conviction. The case was sent back to the sentencing court for resentencing on matters not effecting the validity of the original $100.00 Restitution Fine, which was lawful at the time of original sentencing. At resentencing the court increased the Restitution Fine to $1,000.00. This is unlawful as held by the California Supreme Court in **People v. Henderson (1963) 60 Cal.2d** 482, 495-497, (the Henderson Rule), as was applied to a case which matches the facts of this case at all four points of the compass in **People v. Hanson (2000) 23 Cal.4th** 355. To increase a Restitution Fine upon resentencing violates due process and double jeopardy. See Hanson, supra.

This error in sentencing has been brought to the attention of the trial court who has refused to act by correcting an unlawful sentence. See exhibits A and E. Therefore Petitioner has no other remedy save through this Court's issuance of Mandate to compel the Respondent Court to perform the duty of correcting Petitioner's sentence.

For all the reasons set forth herein the remedy prayed for must be granted.

Dated: _____

Respectfully Submitted by:

_____

Harry Eldridge, In Pro Per